LAW REPORTS
OF
TRIALS OF
WAR CRIMINALS

Selected and prepared by

THE UNITED NATIONS
WAR CRIMES COMMISSION

VOLUME XII

THE GERMAN HIGH COMMAND TRIAL

LONDON

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LAW REPORTS OF TRIALS OF WAR CRIMINALS

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BY THE UNITED NATIONS WAR CRIMES

COMMISSION

One of the aims of this series of Reports is to relate in summary form the course of the most important of the proceedings taken against persons accused of committing war crimes during the Second World War, apart from the major war criminals tried by the Nuremberg and Tokyo International Military Tribunals, but including those tried by United States Military Tribunals at Nuremberg. Of necessity, the trials reported in these volumes are examples only, since the trials conducted before the various Allied Courts of which the Commission has had record, number about 1,600. The trials selected for reporting, however, are those which are thought to be of the greatest interest legally and in which important points of municipal and international law arose and were settled.

Each report, however, contains not only the outline of the proceedings in the trial under review, but also, in a separate section headed " Notes on the Case ", such comments of an explanatory nature on the legal matters arising in that trial as it has been thought useful to include. These notes provide also, at suitable points, general summaries and analyses of the decisions of the courts on specific points of law derived primarily from a study of relevant trials already reported upon in the series. Furthermore, the volumes include, where necessary, Annexes on municipal war crimes laws, their aim being to explain the law on such matters as the legal basis and jurisdiction, composition and rules of procedure on the war crime courts of those countries before whose courts the trials reported upon in the various volumes were held.

Finally, each volume includes a Foreword by Lord Wright of Durley, Chairman of the United Nations War Crimes Commission.

continued inside back cover

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Volume XII

THE GERMAN HIGH COMMAND TRIAL

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1949

CONTENTS

PAGE

FOREWORD BY THE RT. HON. THE LORD WRIGHT OF DURLEY . . . vi

CASE No. 72
THE GERMAN HIGH COMMAND TRIAL

TRIAL OF WILHELM VON LEEB AND THIRTEEN OTHERS

United States Military Tribunal, Nuremberg, 30th December, 1947—28th October, 1948

HEADING, NOTES AND SUMMARY 1

A. OUTLINE OF THE PROCEEDINGS 2

1. THE COURT 2
2. THE INDICTMENT 2
3. PROGRESS OF THE TRIAL 5
4. THE EVIDENCE BEFORE THE TRIBUNAL 5

(i) The Positions of the Accused 5

(ii) The German Military System 7

(*a*) The OKW (Oberkommando der Wehrmacht)—Supreme Command of the Armed Forces . . 8
(*b*) The OKL (Oberkommando der Luftwaffe)—Supreme Command of the Air Force 9
(*c*) The OKM (Oberkommando der Kriegsmarine)—Supreme Command of the Navy 9
(*d*) The OKH (Oberkommando des Heeres)—Supreme Command of the Army 9
(*e*) Army Field Headquarters 10
(*f*) Occupational Headquarters and Units. Armed Forces Commander 10

(iii) Evidence Relating to Counts One and Four. Crimes against Peace—Conspiracy 12
(iv) Evidence Relating to Counts Two and Three. War Crimes and Crimes against Humanity 16

(*a*) General Evidence 16
(*b*) Evidence with Particular Reference to the Commissar Order 23
(*c*) Evidence with Particular Reference to the Barbarossa Jurisdiction Order 29

PAGE

(*d*) Evidence with Particular Reference to the Commando Order 34
(*e*) Evidence with Particular Reference to the Night and Fog Decree 37
(*f*) Evidence with Particular Reference to Hostages and Reprisals 38
(*g*) Evidence with Particular Reference to the Partisan Warfare 40
(*h*) Evidence with Particular Reference to Crimes Committed against Prisoners of War 40
(1) Murder and Ill-treatment of Prisoners of War 41
(2) Segregation and Liquidation of Prisoners of War in Co-operation with the SD and SIPO 45
(3) The Illegal Use of Prisoners of War for Prohibited Labour 46
(*i*) Evidence with Particular Reference to Alleged Acts of Looting, Pillage, Plunder and Spoliation .. 47
(*j*) Evidence with Particular Reference to the Compulsory Recruitment and Deportation of Slave Labour 48
(*k*) Evidence with Particular Reference to the Forced Use of Civilians for Prohibited Work 51
(*l*) Evidence with Particular Reference to the Alleged Murder, Ill-treatment, and Persecution of the Civilian Population, Discrimination, Persecution, and Execution of Jews and Co-operation with the Einsatzgruppen and Sonderkommandos of the SIPO and SD 52
(*m*) Evidence with Particular Reference to Alleged Crimes against the Civilian Population in Connection with Evacuation and in Connection with the Retreat of the German Army in the Eastern Territories 56
(*n*) Evidence with Particular Reference to the Alleged Criminal Conduct by the German Army Under the Accused von Leeb's Command in Connection with the Siege of Leningrad 59

5. THE JUDGMENT OF THE TRIBUNAL 59
(i) The Basic Law Applying to the Case 59
(ii) Objections During the Trial 62
(iii) The Dismissal of the Conspiracy Count 65
(iv) Count One of the Indictment—Aggressive War : Finding of Not Guilty 65
(v) Responsibility of the Wehrmacht for War Crimes .. 71
(vi) The Plea of Superior Orders 71
(vii) Responsibility of a Commanding Officer for Acts Not Ordered by Him 74
(viii) The Responsibility of Staff Officers 80

PAGE

(ix) The Criminality of Certain Orders 82
(x) Hostages and Reprisals 84
(xi) Partisan Warfare 85
(xii) The Interpretation and Applicability of the Hague and Geneva Conventions 86
(xiii) The Findings on Counts II and III 94
(xiv) The Sentences 95
(xv) A Defence Motion 95

B. NOTES ON THE CASE 96
1. The Protection of Prisoners of War 96
2. The Responsibility of Commanders for Offences Committed by their Troops 105
3. The Responsibility of Staff Officers 112
4. Liability for Unexecuted Orders 118
5. The Plea of Military Necessity 123
6. Crimes against Peace 127

FOREWORD

These Reports have in the present production arrived at Volume XII. This volume will contain a Report of only one trial, which has been described as the High Command Trial, because it deals with the responsibility of high-ranking officers of the German army for War Crimes and Crimes against Humanity. The proceedings and evidence are very voluminous, as may be inferred from the fact that the length of the Judgment was 330 pages. The work of digesting the evidence has been performed by Mr. Aars Rynning, the Norwegian member of the Commission's staff. I am satisfied that the work has been admirably done. The Notes on the Case, which, together with the arrangement of those parts of the Judgment in which legal matters are discussed, are Mr. Brand's contribution to the present report, examine various questions on which the Judgment is of particular value. As Editor of these Reports he has also supplied the necessary cross-references and comparisons with earlier judgments of the same series, that is the series of the Subsequent Proceedings at Nuremberg, conducted under General Telford Taylor. In the Foreword to Volume VI, I included some general remarks on these proceedings which I do not desire to repeat. The judgment in the present case is of great interest and importance. Though all these proceedings were held under Control Council Law No. 10 and Military Ordinance No. 7, and thus are under a separate jurisdiction from that of the International Military Tribunal, which is conveniently referred to as I.M.T., there is a substantial uniformity in the Basic Laws and Procedure, and the judgment in the present case is in substance based on the principles enumerated by the I.M.T. But it does illustrate the development which has necessarily arisen by reason of the various complications of fact and of issues which were not present in the I.M.T. trial. The Tribunal which decided the present case has been compelled to do much work of analysis and differentiation and has performed the task in such a way as to add greatly to the development of this branch of law. The same may indeed be said of all the other judgments in the Subsequent Proceedings. No student of this branch of the International Law of war can dispense with a careful study of these Subsequent Proceedings, which have carried the ideas of the I.M.T. forward into problems of fact and law which were not present, and indeed could not have been present, to the minds of the earlier Tribunal. Perhaps I may here be permitted to express a humble tribute to the Judges who have left their homes in the United States and sojourned for many months in Nuremberg for the purpose of conducting these trials and performing the arduous task of preparing the judgments. Their efforts will be now and hereafter unanimously applauded.

In studying this Report I have again been overwhelmed by a sense of the extraordinary mass of human suffering, and of widespread misery over a large part of Europe inflicted on mankind by the accused which form the subject of this volume. Before I make a few desultory observations on the nature of the main issues I cannot help noting one instance which illustrates the extent to which human dignity has been degraded. When, in October and November, 1943, the Germans decided to retreat and evacuate the

Eastern Zone, orders were issued to the General to institute a trek of the inhabitants on foot to the new areas, a notorious trek involving, as was admitted, atrocious hardships and a large percentage of deaths on the victims. In particular the order required that able-bodied labourers should be used for work for the army. Hundreds of thousands of helpless people were thus evacuated. They had to feed themselves. Only bread was distributed on the way. Note this incidental point—the order prescribed that " Children over 10 are considered as labourers."

I do not intend to do more than itemise the different Orders which occasioned a large part of the charges in this indictment. Their general nature is well known by this time. They included, among others, the Commissar Order, the Barbarossa Jurisdiction Order, the Commando Order, the " Night and Fog " decree. There were also charges in respect of the slaughter of hostages and of partisans ; of slave labour and deportees; of every species of crime against prisoners of war ; of looting, pillage, plunder and spoliation. How many millions were slaughtered in the course of these illegal proceedings can never be computed. I can only here refer to the analysis and summary contained in the pages of this Report. Full and accurate as it is, so far as its scope permits, it is not intended to do more than give a clear general picture. Other publications may in the future give a verbatim reproduction of the evidence and the judgment.

The legality of the killing of hostages came up for consideration in the judgment. The Tribunal were content to avoid approving or disapproving the conclusions reached on this important topic in the Hostages Trial. The Tribunal referred to the scheme of safeguards and conditions proposed in that judgment as necessary to be fulfilled before hostages can be lawfully killed. I have elsewhere ventured to submit that under International Law hostages cannot as such be killed. The Tribunal in this case did not feel it necessary to decide between the different conflicting views. Their conclusion was as follows : " If so inhuman a measure as the killing of innocent persons for the offences of others is ever permissible under any theory of International Law, killing without full compliance with all requirements would be murder. If killing is not permissible under any circumstances, then a killing with full compliance with all mentioned prerequisites still would be murder." But the Tribunal held that the prerequisites were not even contemplated or attempted, so that the precise question of principle did not arise.

The charge against the accused of crimes against peace was rejected *in toto* on the ground that the various commanding officers, however high their rank, were not on the policy-making level. The same principle was applied to the count of conspiracy.

As to Counts Three and Four, in respect of war crimes and crimes against humanity, the criminality of the various orders and decrees in their particular aspects and the various degrees of culpability attributable to the individual accused were determined after a careful investigation of their respective status and functions in the German army organization and their

personal responsibility for such crimes. All these issues, which form the outstanding feature of this judgment, were meticulously examined by the Tribunal before they arrived at their findings and sentences. I can only here refer to the careful and exact analysis of the whole complex position contained in the elaborate judgment which it is sought to digest in the ensuing pages of this Volume.

WRIGHT

London, *January*, 1949.

CASE NO. 72

THE GERMAN HIGH COMMAND TRIAL

TRIAL OF WILHELM VON LEEB AND THIRTEEN OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG,
30TH DECEMBER, 1947—28TH OCTOBER, 1948

Wilhelm von Leeb and the other thirteen accused in this case were former high-ranking officers in the German Army and Navy, and officers holding high positions in the German High Command (OKW). All of them were charged with Crimes against Peace, War Crimes, Crimes against Humanity and with Conspiracy to commit such crimes. The War Crimes and Crimes against Humanity charged against them included criminal responsibility in connection with the implementation and execution of the so-called Commissar Order, the Barbarossa Jurisdiction Order, the Commando Order, the Night and Fog Decree, the Hostages and Reprisals Orders, murder and ill-treatment of prisoners of war and of the civilian population in the occupied territories and their use in prohibited work ; discrimination against and persecution and execution of Jews and other sections of the population by the Wehrmacht in co-operation with the Einsatzgruppen and Sonderkommandos of the SD, SIPO and the Secret Field Police ; plunder and spoliation and the enforcement of the slave labour programme of the Reich.

One of the accused, Johannes Blaskowitz, committed suicide in prison on 5th February, 1948, during the trial.

All of the remaining thirteen were acquitted on the Count charging Crimes against Peace whereas the Conspiracy Count was dismissed by the Tribunal " as tendering no issue not contained in the preceding Counts."

As to Counts Two and Three, charging War Crimes and Crimes against Humanity, two of the accused were acquitted, whereas the eleven others were found guilty and sentenced to terms of imprisonment ranging from two years up to life imprisonment.

In its Judgment the Tribunal dealt with a number of legal issues, including the prerequisites for responsibility of commanders for offences committed by their subordinate

and associated units, the plea of superior orders and military necessity, and the interpretation and implementation of the Hague and Geneva Conventions regarding the treatment of prisoners of war and the population of occupied territories.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court before which this trial was held was a United States Military Tribunal set up under the authority of Law No. 10 of the Allied Control Council for Germany, and Ordinance No. 7 of the Military Government of the United States Zone of Germany.(1)

2. THE INDICTMENT

The accused whose names appeared in the Indictment were the following: Generalfeldmarschall Wilhelm von Leeb, Generalfeldmarschall Hugo Sperrle, Generalfeldmarschall Georg Karl Friedrich-Wilhelm von Kuechler, Generaloberst Johannes Blaskowitz,(2) Generaloberst Hermann Hoth, Generaloberst Hans Reinhardt, Generaloberst Hans von Salmuth, Generaloberst Karl Hollidt, Generaladmiral Otto Schniewind General der Infanterie Karl von Roques, General der Infanterie Hermann Reinecke, General der Artillerie Walter Warlimont, General der Infanterie Otto Woehler and Generaloberstabsrichter Rudolf Lehmann.

The Indictment filed against the accused made dedailed allegations which were arranged in four Counts charging Crimes against Peace, War Crimes, Crimes against Humanity and a common plan or conspiracy to commit such crimes. The individual Counts may be summarized in the following way:

Count I—Crimes against Peace

The First Count of the Indictment, in paragraphs 1 and 2, reads as follows:

> " 1. All of the defendants, with divers other persons, including the co-participants listed in Appendix A, during a period of years preceding 8th May, 1945, committed Crimes against Peace as defined in Article II of Control Council Law No. 10, in that they participated in the initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to the planning, preparation, initiation, and waging of wars of aggression, and wars in violation of international treaties, agreements and assurances.
>
> " 2. The defendants held high military positions in Germany and committed Crimes against Peace in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of

(1) For a general account of the United States Law and practice regarding war crime trials held before Military Commissions and Tribunals and Military Government Courts, see Vol. III of this series, pp. 103-120.

(2) The accused Johannes Blaskowitz committed suicide in prison on 5th February, 1948, and thereby the case against him was terminated.

organizations and groups connected with, the commission of Crimes against Peace."

Then follow paragraphs 3 to 44, both inclusive, covering plans of aggressions, and wars and invasions against Austria, Czechoslovakia, Poland, Great Britain, France, Denmark, Norway, Belgium, The Netherlands, Luxembourg, Yugoslavia, Greece, the U.S.S.R. and the United States of America, and claiming to show the unfolding of these plans of aggression and to particularize the participation of the defendants in the formulation, distribution, and execution thereof.

Count II—War Crimes and Crimes against Humanity: Crimes against Enemy Belligerents and Prisoners of War

Count II of the Indictment, paragraph 45, reads as follows:

" 45. Between September, 1939, and May, 1945, all of the defendants herein, with divers other persons including the co-participants listed in Appendix A, committed War Crimes and Crimes against Humanity, as defined in Article II of Control Council Law No. 10, in that they participated in the commission of atrocities and offences against prisoners of war and members of armed forces of nations then at war with the Third Reich or under the belligerent control of or military occupation by Germany, including but not limited to murder, ill-treatment, denial of status and rights, refusal of quarter, employment under inhumane conditions and at prohibited labour of prisoners of war and members of military forces, and other inhumane acts and violations of the laws and customs of war. The defendants committed War Crimes and Crimes against Humanity in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups connected with, the commission of War Crimes and Crimes against Humanity."

Then follows paragraph 46, which in general terms sets out the unlawful acts as follows:

" 46. Unlawful orders initiated, drafted, distributed and executed by the defendants directed that certain enemy troops be refused quarter and be denied the status and rights of prisoners of war, and that certain captured members of the military forces of nations at war with Germany be summarily executed. Such orders further directed that certain members of enemy armed forces be designated and treated by troops of the German armed forces, subordinate to the defendants, either as ' partisans, communists, bandits, terrorists ' or by other terms denying them the status and rights of prisoners of war. Prisoners of war were compelled to work in war operations and in work having a direct relation to war operations, including the manufacture, transport and loading of arms and munitions, and the building of fortifications. This work was ordered within the combat zone as well as in rear areas. Pursuant to a ' total war ' theory and as part of a programme to exploit all non-German peoples, prisoners of war were denied rights to which they were entitled under conventions and the laws and customs of war. Soldiers were branded, denied adequate food, shelter, clothing

and care, subjected to all types of cruelties and unlawful reprisals, tortured and murdered. Special screening and extermination units, such as Einsatz Groups of the Security Police and Sicherheitsdienst (commonly known as the ' SD '), operating with the support and under the jurisdiction of the Wehrmacht, selected and killed prisoners of war for religious, political and racial reasons. Many recaptured prisoners were ordered executed. The crimes described in paragraphs 45 and 46 included, but were not limited to, those set forth hereafter in this Count."

This is followed by paragraphs 47 to 58, both inclusive, which particularize certain unlawful acts, such as the issuance and execution of the " Commissar Order," the " Commando Order," etc., and the participation of the accused in the formulation, distribution and execution of these unlawful plans.

Count III—War Crimes and Crimes against Humanity : Crimes against Civilians

Count III of the Indictment, paragraph 59, reads as follows :

" 59. Between September, 1939, and May, 1945, all of the defendants herein, with divers other persons including the co-participants listed in Appendix A, committed War Crimes and Crimes against Humanity as defined in Article II of Control Council Law No. 10, in that they participated in atrocities and offences, including murder, extermination, ill-treatment, torture, conscription to forced labour, deportation to slave labour or for other purposes, imprisonment without cause, killing of hostages, persecutions on political, racial and religious grounds, plunder of public and private property, wanton destruction of cities, towns and villages, devastation not justified by military necessity, and other inhumane and criminal acts against German nationals and members of the civilian populations of countries and territories under the belligerent occupation of, or otherwise controlled by Germany. The defendants committed War Crimes and Crimes against Humanity, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups which were connected with, the commission of War Crimes and Crimes against Humanity."

The following paragraphs 60 to 82 set forth generally and particularly the alleged unlawful acts, such as enslavement of the population, plunder of public and private property, murder, etc., and the alleged participation of the accused in the formulation, distribution and execution of these unlawful plans.

Count IV—Common Plan or Conspiracy

The Fourth Count, paragraphs 83 to 84, reads as follows :

" 83. All the defendants, with divers other persons, during a period of years preceding 8th May, 1945, participated as leaders, organizers, instigators and accomplices in the formulation and execution of a common plan and conspiracy to commit, and which involved the commission of, Crimes against Peace (including the acts constituting War Crimes and Crimes against Humanity, which were committed as an

integral part of such Crimes against Peace) as defined in Control Council Law No. 10, and are individually responsible for their own acts and for all acts committed by any persons in the execution of such common plan or conspiracy.

" 84. The acts and conduct of the defendants set forth in Counts I, II and III of this Indictment formed a part of said common plan or conspiracy and all the allegations made in said Counts are incorporate in this Count."

3. PROGRESS OF THE TRIAL

A copy of the Indictment in the German language was served upon each of the accused at least thirty days prior to the arraignment on 30th December, 1947, at which time each of them, in the presence of counsel of his own choice, entered a plea of " Not guilty."

Arraignment took place on 30th December, 1947, and judgment was delivered and sentences passed on 27th and 28th October, 1948. Each of the accused was represented by German lawyers of his own choice.

The trial was conducted in two languages—English and German—and all documents submitted were translated and given to counsel. The defence was also furnished with photostat copies of the original captured documents.

The case was not closed for the taking of evidence until 6th August, 1948. The defence introduced a total of 2,130 documents and affidavits as exhibits in the presentation of their defence. The prosecution introduced 1,778 documents in evidence.

One hundred and sixty-five witnesses were ordered to be summoned for the defence. It was possible to procure one hundred and five of those summoned, and of these only eighty were in fact called by the defence.

4. THE EVIDENCE BEFORE THE TRIBUNAL

(i) *The Positions of the Accused*

WILHELM VON LEEB—Generalfeldmarschall (General of the Army) ; October, 1935, to February, 1938, Commander-in-Chief Army Group Command (Heeresgruppenkommando) 2 ; October, 1938, to November, 1938, Commander-in-Chief 12th Army ; September, 1939, to May, 1941, Commander-in-Chief Army Group C ; June, 1941, to January, 1942, Commander-in-Chief Army Group North.

HUGO SPERRLE—Generalfeldmarschall (General of the Army) ; November, 1936, to October, 1937, Commander of the " Condor Legion " in Spain ; February, 1938, to January, 1939, Commanding General of Air Group (Luftgruppe) 3 ; February, 1939, to August, 1944, Commander-in-Chief Air Fleet (Luftflotte) 3.

GEORG KARL FRIEDRICH-WILHELM VON KUECHLER—Generalfeldmarschall (General of the Army) ; September, 1939, Commander-in-Chief 3rd Army ; October and November, 1939, Commander of East Prussian Defence Zone ; November, 1939, to January, 1942, Commander-in-Chief 18th Army ; January, 1942, to January, 1944, Commander-in-Chief Army Group North.

JOHANNES BLASKOWITZ—Generaloberst (General) ; November, 1939, to August, 1939, Commander-in-Chief Army Group Command (Heeresgruppenkommando) 3 ; September, 1939, to October, 1939, Commander-in-Chief 8th Army ; October, 1939, Commander-in-Chief 2nd Army ; October, 1939, to May, 1940, Commander-in-Chief East (Oberbefehlshaber Ost) ; May, 1940, Commander-in-Chief 9th Army ; June, 1940, Military Commander (Militärbefehlshaber) Northern France ; October, 1940, to May, 1944, Commander-in-Chief 1st Army ; May, 1944, to September, 1944, Acting Commander-in-Chief Army Group G ; December, 1944, to January, 1945, Commander-in-Chief Army Group G ; January, 1945, to April, 1945, Commander-in-Chief Army Group H ; April, 1945, Commander-in-Chief Netherlands and 25th Army.

HERMANN HOTH—Generaloberst (General) ; November, 1938, to November, 1940, Commanding General XV Corps ; November, 1940, to October, 1941, Commander Panzer Group 3 ; October, 1941, to April, 1942, Commander-in-Chief 17th Army ; May, 1942, to December, 1943, Commander-in-Chief 4th Panzer Army.

HANS REINHARDT—Generaloberst (General) ; October, 1938, to February, 1940, Commander 4th Panzer Division ; February, 1940, to October, 1941, Commanding General XLI Corps ; October, 1941, to August, 1944, Commander of Panzer Group 3 (later 3rd Panzer Army) ; August, 1944, to January, 1945, Acting Commander-in-Chief Army Group Centre.

HANS VON SALMUTH—Generaloberst (General) ; 1937 to August, 1939, Chief of Staff Army Group Command (Heeresgruppenkommando) 1 ; September and October, 1939, Chief of Staff Army Group North ; October, 1939, to May, 1941, Chief of Staff Army Group B ; May, 1941, to February, 1942, Commanding General XXX Corps ; April and May, 1942, Acting Commander-in-Chief 17th Army ; June and July, 1942, Acting Commander-in-Chief 4th Army ; July, 1942, to February, 1943, Commander-in-Chief 2nd Army ; August, 1943, to August, 1944, Commander-in-Chief 15th Army.

KARL HOLLIDT—Generaloberst (General) ; November, 1938, to August, 1939, Commander of Infantry (Infanteriefuehrer) in District 9 ; September, 1939, Commander 52nd Infantry Division ; September, 1939, to October, 1939, Chief of Staff 5th Army ; October, 1939, to May, 1940, Chief of Staff to the Commander-in-Chief East ; May, 1940, to October, 1940, Chief of Staff 9th Army ; October, 1940, to January, 1942, Commander 50th Infantry Division ; January, 1942, to December, 1942, Commanding General XVII Corps ; December, 1942, to March, 1943, Commander Army (Armeeabteilung) Hollidt ; March, 1943, to April, 1944, Commander-in-Chief 6th Army.

OTTO SCHNIEWIND—Generaladmiral (Admiral) ; November, 1937, to November, 1938, Chief of Navy Armament Office (Marine-Wehr-Amt) ; November, 1938, to May, 1941, Chief of the Navy Command Office (Marine-Kommando-Amt), and Chief of Staff of the Naval War Staff (Seekriegsleitung) ; June, 1941, to July, 1944, Commander of the Fleet (Flottenchef) ; March, 1942, to August, 1942, Commander of Naval Battle Forces (Flottenstreitkraefte) in Norway ; March, 1943, to May, 1944, Commander of Naval Group North (Marinegruppe Nord).

KARL VON ROQUES—General der Infanterie (Lieutenant-General, Infantry); April, 1940, to March, 1941, Commander of a Division in the Zone of the Interior ; March, 1941, to June, 1942, Commander Rear Area, Army Group (Rueckwaertiges Heeresgebiet) South ; September and October, 1941, Commanding General of Group (Armeegruppe) von Roques ; July, 1942, to December, 1942, Commander Rear Area, Army Group A.

HERMANN REINECKE—General der Infanterie (Lieutenant-General, Infantry) ; January, 1939, to December, 1939, Chief of the Department " Armed Forces General Affairs " (Amtsgruppe Allgemeine Wehrmachts Angelegenheiten) in the High Command of the Armed Forces (Oberkommando der Wehrmacht " OKW ") ; 1939-1945, Chief of the General Office of the OKW (Allgemeines Wehrmachts Amt) ; 1943 to 1945, Chief of the National Socialist Guidance Staff of the OKW (N.S. Fuehrungsstab im OKW).

WALTER WARLIMONT—General der Artillerie (Lieutenant-General, Artillery) ; August to November, 1936, Military Envoy to General Franco in Spain and Leader of the German Volunteer Corps ; November, 1938, to September, 1944, Chief of Department National Defence (Landsverteidigung (L)) in the Armed Forces Operation Staff (Wehrmachtfuehrungstab " WFST ") of the OKW ; January, 1942, to September, 1944, Deputy Chief " WFST."

OTTO WOEHLER—General der Infanterie (Lieutenant-General, Infantry) ; April, 1938, Ia (Operations Officer) Army Group 5 (later changed to AOK 14) ; October, 1939, to October, 1940, Chief of Staff XVII Corps ; October, 1940, to May, 1942, Chief of Staff 11th Army ; May, 1942, to February, 1943, Chief of Staff Army Group Centre ; February, 1943, to July, 1943, Commanding General I Corps ; July and August, 1943, Acting Commander XXVI Corps ; August, 1943, to December, 1944, Commander-in-Chief 8th Army ; December, 1944, to April, 1945, Commander-in-Chief Army Group South.

RUDOLF LEHMANN—Generaloberstabsrichter (Lieutenant-General, Judge Advocate) ; July, 1938, to May, 1944, Ministerial Director of the OKW and Chief of the Legal Division (Wehrmachtrechtswesen " WR ") ; May, 1944, to May, 1945, Judge Advocate-General of the OKW (Generaloberstabsrichter).

(ii) *The German Military System*

The evidence showed that in February, 1938, a crisis in the relations between Hitler and the Army led to a drastic reorganization of the German High Command. In place of the Ministry of War, overall control and co-ordination of the three services was achieved through the newly created Armed Forces High Command (Oberkommando der Wehrmacht, known as " OKW "). Hitler himself assumed the title " Commander-in-Chief of the Armed Forces," and the OKW was, in essence, Hitler's working staff for Armed Forces matters. Keitel was given the title " Chief " of the OKW

and the rank of Minister. Von Brauchitsch replaced von Fritsch as Commander-in-Chief of the Army.

(a) *The OKW (Oberkommando der Wehrmacht)—Supreme Command of the Armed Forces*

The OKW controlled all matters of inter-service policy. It was responsible for preparations for national defence in time of peace, and for the overall conduct of operations during war. Directly under Hitler, Keitel served as Hitler's highest executive officer in the administration of the Armed Forces and in the application of Hitler's policies and plans.

It appeared that Hitler, through exercise of his functions as the Supreme Commander of the OKW, could and in many instances did exercise through the OKW the overall command of the three branches of the armed services.

The most important section of the OKW, directly concerned with operations in the field, etc., was called the Armed Forces Operations Staff (Wehrmachtsfuehrungsstab or WFST). This was headed during the war by General Alfred Jodl. Jodl's immediate subordinate was the accused Warlimont, as chief of Department National Defence (Landesverteidigung (L)) in the Armed Forces Operations Staff. In addition, in January, 1942, Warlimont was appointed Jodl's deputy with the title of Deputy Chief of the Armed Forces Operations Staff.

Besides the WFST, there were numerous additional branches and sections within the OKW, all headed by senior officers, experts in their own fields, who were directly responsible to Keitel.

The General Armed Forces Office (Allgemeines Wehrmachtamt—AWA) was one of the principal administrative agencies within the OKW. The chief of this office was the accused Reinecke, who held this position continuously from December, 1939, until May, 1945. The primary responsibilities of this office were administrative and executive rather than operational.

One of the most important sections of AWA was the Office of the Chief of Prisoner-of-War Affairs (Chef des Kriegsgefangenenwesens—Chef Kriegs-Gef) which was in administrative charge of all matters relating both to German and Allied prisoners of war. The Office of the Chief of Prisoner-of-War Affairs remained a part of the General Armed Forces Office (AWA) until October, 1944, at which time many functions of this office were transferred to SS supervision. Another section of AWA was the National Socialist Guidance Staff of the OKW (Nationalsozialistischer Fuehrungsstab des OKW—NSF/OKW), established in December, 1943. This agency was to ensure uniform political indoctrination in the Armed Forces in co-operation with the Nazi Party Chancellery. This office was placed under the direct control of the accused Reinecke.

Another important branch of the OKW was the Armed Forces Legal Department (Wehrmachtrechtsabteilung—WR). From 1938 until 1945 it was headed by the accused Lehmann. The Legal Department was charged with certain legal matters in the preparation of legal opinions of interest to

all three branches of the Armed Forces, but the legal staffs of the three forces were not subordinate to him.

(b) *The OKL (Oberkommando der Luftwaffe)—Supreme Command of the Air Force*

The Air Force was the youngest of the three branches comprising the German Armed Forces. The creation of the German Air Force occurred officially in March, 1935, and Goering was appointed as its Commander-in-Chief with the rank of Air Force General.

(c) *The OKM (Oberkommando der Kriegsmarine)—Supreme Command of the Navy*

The Navy was the smallest of the services, and its personnel and units were numerically the smallest within the German Armed Forces. From 1928 until 1943 the OKM was headed by Fleet Admiral Erich Raeder. From 1943 to the end of the war in May, 1945, Fleet Admiral Doenitz, succeeding Raeder, was Commander-in-Chief of the German Navy, having previously been in charge of its most important weapon, the submarine.

Within OKM, performing functions somewhat analogous to the General Staff of OKH, was the Naval War Staff (Seekriegsleitung (SKL)) directly subordinate to the Commander-in-Chief of the Navy. It concerned itself mostly with operational and intelligence questions. Between the years 1938 and 1941 the accused Schniewind was the Chief of Staff of the SKL, directly responsible to Raeder.

Under the OKM, the Naval Group Commands (Marinegruppen Befehlshaber) controlled all naval operations in a given sector, with the exception of the operations of the High Sea Fleet and the submarines, which by their very nature were too mobile to be restricted to a given area command. Between 1941 and 1944 the accused Schniewind was Commander of the High Sea Fleet.

(d) *The OKH (Oberkommando des Heeres)—Supreme Command of the Army*

The Army was by far the largest and most important of the three branches of the Wehrmacht. From 1938 until December, 1941, Field-Marshal Walter von Brauchitsch was Commander-in-Chief of the German Army with General Franz Halder as his Chief of Staff. In December, 1941, Hitler relieved von Brauchitsch of his assignment and himself took over command of the German Army. Hitler retained his position as Commander-in-Chief of the German Army until his presumed death at the end of the war. The result of unification of command, whereby Hitler was Supreme Commander-in-Chief of the German Armed Forces and Commander-in-Chief of the German Army, was a partial merger and overlapping of the functions of the OKW and OKH. In September, 1942, Halder was relieved as Chief of Staff by General Kurt Zeitzler. Colonel-General Heinz Guderian replaced Zeitzler in July, 1944, and himself gave way to General Hans Krebs in February, 1945.

After Hitler himself took command of the German Army, the highest Field and Occupational Headquarters of the German Army were directly under Hitler, either in his capacity as Supreme Commander of the

Wehrmacht, or in his capacity as Commander-in-Chief of the Army. Because of the partial merger arising from Hitler's dual capacity and command functions, it became difficult at times to delineate clearly between the responsibilities of the OKW and those of the OKH.

(e) *Army Field Headquarters*

Army Groups and Armies. The largest field formation in the German Army was known as an Army Group, which was a headquarters controlling two or more Armies. An Army Group was customarily commanded by a Feldmarschall (five-star general), or more rarely by a Generaloberst (four-star general). An Army might be commanded by a Feldmarschall, a Generaloberst, or a General (three-star general).

At the beginning of the war, an Army Group Headquarters was usually formed for a particular campaign or occupational theatre. During actual operations, the principal purpose of an Army Group was to exercise operational command over the Armies subordinated to it. It had at first a relatively small staff devoted purely to operational matters. As the war progressed, administrative functions were added and its staff increased. An Army Headquarters was a more permanent command framework. In addition to its operational and tactical control of subordinate units, the Army was the top field headquarters for matters of administration, supply, and other functions.

Corps and Lower Headquarters. An Army controlled one or more (usually between two and seven) Corps. The Corps was a permanent headquarters which controlled as a rule from two to seven divisions. The division was the basic " self-contained " unit of the German Army and its structure varied according to its type.

Headquarters Staff Organization. The size and structure of an Army Headquarters varied to a considerable extent. All headquarters were, however, organized according to a uniform system and consisted basically of a commanding officer assisted by a staff. The staffs of corps and higher headquarters were headed by a chief of staff. At all German headquarters, the staff officer in charge of operations was known as " Ia," the chief supply officer as " Ib," and the chief intelligence officer as " Ic."

SS Field Formations (Waffen SS). When war broke out in 1939, Himmler commenced the formation into divisions of units of the SS, armed and trained for employment with the Army. Only two or three such divisions were formed prior to the Russian campaign, but by the end of the war there were many SS divisions.

For certain administrative purposes, the Waffen SS units remained part of the SS and under the control and command of Himmler as Reichsfuehrer SS. However, for operational purposes in combat and in occupied areas, the SS divisions were under the command of the Army, and their employment differed little from that of the regular divisions of the Army.

(f) *Occupational Headquarters and Units. Armed Forces Commander*

In a territory occupied by German forces, the Germans sometimes found

it desirable to appoint a senior overall commander to whom the heads of the Army, Navy, and Air Force in the territory were all tactically responsible. Such commanders had strategic as well as administrative responsibility, and were directly responsible to OKW.

Military Commander. In German-occupied territory, the administration of the area in conformity with rules and policies laid down by the German authorities was entrusted to an Army officer, usually a General, who was designated as Military Commander (Militaerbefehlshaber). The Military Commanders had the primary mission of ensuring security and order within the region or country that they were responsible for, including the protection of roads, railroads, supply lines, and communications.

Rear Area Commanders. During war time the operational area of the Army (Heeres) was divided into various segments. The operational area of an army (Armee) consisted of the combat zone and an army rear area. The operational area of an army group consisted of the operational areas of the armies under it and an army group rear area. The boundaries of the army group rear area coincided with the boundaries of the army rear areas and extended to the territory under civil administration of the Reich, such as the Commissariat Ostland in the east.

The army group and army rear areas were commanded by general officers who were directly responsible to the commander-in-chief of the army group, or army, respectively. The missions with which these commanders were charged can be summarized as follows :

1. Administration of the occupied area ;
2. The maintenance of peace and order in these areas ; and
3. Responsibility for the security of the railroads and main supply routes leading to the front line, as well as for all supply agencies engaged on behalf of the front-line troops.

In order to accomplish these missions, these commanders often had one or several of the following units at their disposal :

1. Security divisions (Sicherungsdivisionen) ;
2. Units of the German police ;
3. Indigenous police and constabulary forces recruited from the native population ;
4. Special security battalions (Landes-Schuetzenbataillone).

For the administration of the civilian population, the following subordinate headquarters were usually organized in an army or army group rear area :

1. District Main Headquarters (Oberfeldkommandanturen) ;
2. Sub-district Headquarters (Feldkommandanturen) ; and
3. Sub-district Detachments (Ortskommandanturen).

In addition to these, numerous special staffs were at the disposal of the commanders of the rear areas, which were charged with such tasks as supervision over agricultural output, forestry service, mining, and industrial utilization.

The commanders of army rear areas were generally called " Koruecks " (Kommandier des rueckwaertigen Armeegebietes). The commanders of army group rear areas were known as " Befehlshaber des rueckwaertigen Heeresgebietes," and they often carried after their titles the numerical designation identifying the army group rear area for administrative purposes. Thus, the accused von Roques was known as the Commander of Army Group Rear Area 103 (South).

Higher SS and Police Leaders. During the course of the Nazi regime, Heinrich Himmler succeeded in bringing about an almost complete merger of the regular German police forces with the police and intelligence components of the SS. This merger was reflected in Himmler's own title—Leader of the SS and Chief of the German Police (Reichsfuehrer SS and Chef der Deutschen Polizei). Thereafter, Himmler designated various of his subordinates to head the SS and police activities in specified areas of Germany and in German-occupied territory. An individual thus designated was called a " Higher SS and Police Leader " (Hoeherer SS and Polizei Fuehrer, usually abbreviated HSSPF). In the occupied territories, the HSSPFs continued to be personally responsible to Himmler and had constant instructions from him, but they were, for operational purposes, responsible to the senior military commander stationed in that territory. The principal functions of the HSSPFs were to control the local police authorities, handle special police and intelligence matters, and carry out other special missions of a security nature for Himmler and for the military authorities. An HSSPF usually held the rank of Gruppenfuehrer or Obergruppenfuehrer in the SS, these ranks being respectively the equivalent of a two-star and a three-star general in the United States Army.

(iii) *Evidence Relating to Counts I and IV. Crimes against Peace—Conspiracy*(1)

It was clear from the evidence that none of the accused had held positions on a policy-making level. Regardless of whether they had at any time had or had not actual knowledge of, or were involved in, concrete plans and preparations for aggressive wars or invasions, it was established by the evidence that they were not in a position which enabled them to exercise any influence on such a policy. No matter what their rank or status, it was clear from the evidence that they had been outside the policy-making circle close to Hitler and had had no power to shape or influence the policy of the German State. They had in their capacities as Commanders and Staff Officers below the policy level, and on orders, taken part in the planning of campaigns, preparing means for carrying them out and had fought the wars and carried out the invasions after they had been instituted.

The defence asserted that there was considerable opposition to Hitler's plans and orders by the higher military leadership. General Franz Halder, who was Chief of the German General Staff from 1938 to 1942, testified that

(1) As will appear from the outline of the Judgment, all the accused were found not guilty under Count I of the Indictment. As to the Conspiracy Count (Count IV) it will likewise appear from the Judgment that this Count was dismissed by the Tribunal " as tendering no issue not contained in the preceding Counts."

Hitler's plans to invade the Sudetenland caused the formation of a plot for a coup to overthrow Hitler, but that this plot was abandoned because of the Munich Pact. The success of Hitler at Munich, however, increased his prestige with all circles of the German people, including the higher military leadership.

In 1939, Hitler advised certain of the high military leaders of his decision to attack France by violating the neutrality of the Low Countries. On 11th October, 1939, the accused, von Leeb, wrote to his Commander-in-Chief, von Brauchitsch, inclosing a memorandum prepared by him advising against this course of action. In it he argued that the invasion would develop into a long-drawn-out trench warfare, and then continued :

> " . . . Besides, we will not be in a position to rally allies to our cause. Even, now, Italy is sitting on the fence, and Russia has accomplished everything it had aimed at by virtue of our victories, and by this has again become a predominant and directly decisive factor as far as Central Europe is concerned. Furthermore, Russia's attitude remains uncertain in view of its continued diplomatic relations to the Western Powers. The more we tie ourselves down in the West the more freedom the Russians will have for their decisions. On the other hand, Belgium and, in the course of the years, the United States of America as well will join our enemies, and the Dominions will exert all their strength to give effective assistance to the Mother country."

Then, in discussing the political repercussions which would follow from this proposed action, he said :

> " Any violation of Belgium's neutrality is bound to drive that country into the arms of France. France and Belgium will then have one common foe : Germany, which, for the second time within 25 years, assaults neutral Belgium ! Germany, whose government solemnly vouched for and promised the preservation of and respect for this neutrality only a few weeks ago ! I have already elaborated under paragraph 1 on the fact that in such a case it is highly probable that France will immediately rush strong forces to the aid of the Belgians, which means that there will be heavy fighting already on Belgian soil.
>
> " If Germany, by forcing the issue, should violate the neutrality of Holland, Belgium, and Luxemburg, a neutrality which has been solemnly recognized and vouched for by the German Government, this action will necessarily cause even those neutral States to reverse their declared policy towards the Reich, which up till now showed some measure of sympathy for the German cause. The Reich, which cannot count on Italy's or Russia's military assistance, will become increasingly isolated also economically. Especially North America, whose population easily falls for such propaganda slogans, will become more inclined to submit to England's and France's influence."

Then on 31st October, 1939, von Leeb wrote von Brauchitsch a letter in which he said :

> " I consider the military annihilation of the English, French, and

Belgians a goal which cannot be attained at present. For only if they are annihilated would they, if attacked, be ready for peace.

" To associate the successes in the East with the wishful thinking in regard to the West would be a fatal deviation from reality.

" In the political field, we have Poland as security in our hands, don't we ? If that doesn't suit our opponents, then let *them* attack.

" The whole nation is filled with a deep longing for peace. It doesn't want the impending war and regards it with no feeling of sympathy whatsoever. If the Party offices are reporting anything else, they are withholding the truth. The people are now looking forward to having peace result from the policies of their Fuehrer, because they feel quite instinctively that it is impossible to destroy France and England and that any more extensive plans must therefore be held in abeyance. As a soldier, one is forced to say the same.

" If the Fuehrer were now to make an end to the present situation, under conditions which were in some measure acceptable, no one would interpret this as a sign of weakness or of yielding, but rather as recognizing the true status of power. The granting of an autonomy for Czechoslovakia and allowing the remainder of Poland to stand as a nation would probably meet with the complete understanding of the entire German people. The Fuehrer would then be honoured as a prince of peace, not only by the entire German people, but assuredly also by large parts of the world as well.

" I am prepared to stand behind you personally to the fullest extent in the days to come and to bear the consequences, desirable or necessary."

In spite of this, the plans went on for the invasion which, however, was delayed until the following May. Von Leeb testified that this delay was brought about by the efforts of von Bock, Halder, and himself, in the hope that the additional time might allow a diplomatic settlement. The reasons given for the delay were purely military ; for instance, that the roads were impassable and the equipment defective. The moral aspect was not considered.

So it seems clear that there was some opposition among the military leadership to Hitler's plans, but that in spite of their opposition, they allowed themselves to be used by him. Von Leeb was asked by a member of the Tribunal why it was that this leadership was impotent and helpless against Hitler, to which he replied :

" Hitler was a demon, he was a devil. General Halder has testified here that you couldn't know what was going on in his mind. That, perhaps, is how it happened that those wills which were opposing this one will were too weak to be successful. Above all, this will was represented in our top-level leadership, but we could not get at him. There was no way of convincing Hitler. He knew everything better than everybody else, and that is how disaster took its course.

"If now in retrospect you look back on the whole situation, one might perhaps think that we, the high military leaders, should have formed a more united front in opposition to Hitler. Let's perhaps take the following case. Herr von Brauchitsch and the three of us, the three army group commanders, one day confront Hitler and tell him, 'So far and no further.' Behind us is the whole of the German Army. I don't believe that that would have made a strong impression on Hitler. He would have had the four of us arrested and put into a concentration camp."

The testimony of General Halder, referred to by von Leeb, was in response to a request that he give briefly his impression of Hitler, and is as follows :

"This is a very difficult task. A personality which was so unusual is difficult to sketch with very few words. The picture which I gained of Hitler is as follows : An unusual power of intellect ; an amazingly quick comprehension ; but not a trained person who could adapt himself to logical lines of thought ; a person with very strong emotional tendencies ; his decisions were conditioned by what he called intuition, that is his emotions, but no clear logically thought-out considerations ; his intellect also included an amazing power of imagination and phantasy which in an astonishing degree had its repercussion in his lines of thought or events ; substantial parts of his character were a tremendous tenacity and energy of will-power which also enabled him to surmount all obstacles, even in minor matters. The thing that most impressed me about Hitler was the complete absence of any ethical or moral obligation ; a man for whom there were no limits which he could not transcend by his action or his will ; he knew only his purpose and the advantage that he pursued ; that for him was the imperative call. As far as it seemed to me, he was a very lonely man who lacked the capacity to enter into personal contact with other human beings and thus to relax and to release his personality. He was thus always torn by tension which made co-operation with him extremely difficult. I was not prepared for your question, Your Honour. This is a question about which many books will yet be written, and I shall be grateful to your Honours if you would be satisfied with this brief sketch of mine."

In the closing statement of General von Leeb on behalf of all the defendants, he referred repeatedly to the difficulties confronting them, saying :

"However, in the Third Reich, under the dictatorship of Hitler, we found ourselves faced with a development which was in contrast to our principles and nature. It is not true to say that we as officers changed—the demands made of us became different.

"We sought to oppose this evolution under the Third Reich, but we lacked the means which might have been effective under a dictatorship."

Again he said :

"In regard to Hitler's instructions, which went against our humane and soldierly feelings, we were never merely his tools without a will of our own. We did oppose his instructions as far as we deemed this to be possible or advisable, and we have toned their wording down and rendered them ineffective or mitigated them in practice."

(iv) *Evidence Relating to Counts Two and Three. War Crimes and Crimes against Humanity*

(a) *General Evidence*

The following *general* factual findings of the International Military Tribunal as to the War Crimes and Crimes against Humanity committed by or under the responsibility of the German Wehrmacht[1] were not only not contested, but were also fully sustained by the evidence submitted in the present case :

WAR CRIMES AND CRIMES AGAINST HUMANITY

" The evidence relating to War Crimes has been overwhelming, in its volume and its detail. It is impossible for this Judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented. The truth remains that War Crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the High Seas, and were attended by every conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of ' total war,' with which the aggressive wars were waged. For in this conception of ' total war,' the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties all alike are of no moment ; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, War Crimes were committed when and wherever the Fuehrer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation. . . .

" Other War Crimes, such as the murder of prisoners of war who had escaped and been recaptured, or the murder of Commandos or captured airmen, or the destruction of the Soviet Commissars, were the result of direct orders circulated through the highest official channels. . . .

" Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. . . .

" In the course of the war, many Allied soldiers who had surrendered to the Germans were shot immediately, often as a matter of deliberate, calculated policy. On 18th October, 1942, the defendant Keitel circulated a directive authorized by Hitler, which ordered that all members of Allied ' Commando ' units, often when in uniform and whether armed or not, were to be ' slaughtered to the last man,' even if they attempted to surrender. It was further provided that if such Allied troops came into the hands of the military authorities after being first captured by the local police, or in any other way, they should be handed over immediately to the SD. This order was supplemented from time to time, and was effective throughout the

(1) See the *Judgment of the International Military Tribunal*, Nuremberg edition. pp. 226-238.

remainder of the war, although after the Allied landings, in Normandy in 1944, it was made clear that the order did not apply to ' Commandos ' captured within the immediate battle area. Under the provisions of this order, Allied ' Commando ' troops, and other military units operating independently, lost their lives in Norway, France, Czechoslovakia, and Italy. Many of them were killed on the spot, and in no case were those who were executed later in concentration camps ever given a trial of any kind. . . .

" In March, 1944, the OKH issued the ' Kugel ' or ' Bullet ' decree, which directed that every escaped officer and NCO prisoner of war who had not been put to work, with the exception of British and American prisoners of war, should on recapture be handed over to the SIPO and SD. This order was distributed by the SIPO and SD to their regional offices. These escaped officers and NCOs were to be sent to the concentration camp at Mauthausen, to be executed upon arrival, by means of a bullet shot in the neck.

" In March, 1944, fifty officers of the British Royal Air Force, who escaped from the camp at Sagan where they were confined as prisoners, were shot on recapture, on the direct orders of Hitler. Their bodies were immediately cremated, and the urns containing their ashes were returned to the camp. It was not contended by the defendants that this was other than plain murder, in complete violation of international law.

" When Allied airmen were forced to land in Germany, they were sometimes killed at once by the civilian population. The police were instructed not to interfere with these killings, and the Ministry of Justice was informed that no one should be prosecuted for taking part in them.

" The treatment of Soviet prisoners of war was characterized by particular inhumanity. The death of so many of them was not due merely to the action of individual guards, or to the exigencies of life in the camps. It was the result of systematic plans to murder. More than a month before the German invasion of the Soviet Union, the OKW were making special plans for dealing with political representatives serving with the Soviet Armed Forces who might be captured. One proposal was that ' political Commissars *of the Army* are not recognized as *Prisoners of War*, and are to be *liquidated* at the latest in the transient prisoner-of-war camps.' The defendant Keitel gave evidence that instructions incorporating this proposal were issued to the German Army.

" On 8th September, 1941, regulations for the treatment of Soviet prisoners of war in all prisoner-of-war camps were issued, signed by General Reinecke, the head of the prisoner-of-war department of the High Command. Those orders stated :

> ' The Bolshevist soldier has therefore lost all claim to treatment as an honourable opponent, in accordance with the Geneva Convention. . . . The order for ruthless and energetic action must be given at the slightest indication of insubordination, especially in the case of Bolshevist fanatics. Insubordination, active or passsive resistance, must be broken immediately by force of arms (bayonets, butts, and firearms) . . . Anyone carrying out the order who does not use his weapons, or does so with insufficient energy, is punishable . . .

Prisoners of war attempting escape are to be fired on without previous challenge. No warning shot must ever be fired . . . The use of arms against prisoners of war is as a rule legal.'

" The Soviet prisoners of war were left without suitable clothing ; the wounded without medical care ; they were starved, and in many cases left to die.

" On 17th July, 1941, the Gestapo issued an order providing for the killing of all Soviet prisoners of war who were or might be dangerous to National Socialism. The order recited :

' The mission of the Commanders of the SIPO and SD stationed in Stalags is the political investigation of all camp inmates, the elimination and further " treatment " (*a*) of all political, criminal, or in some other way unbearable elements among them, (*b*) of those persons who could be used for the reconstruction of the occupied territories . . . Further, the Commanders must make efforts from the beginning to seek out among the prisoners, elements which appear reliable, regardless of whether there are Communists concerned or not, in order to use them for intelligence purposes inside of the camp, and if advisable, later in the occupied territories also. By use of such informers, and by use of all other existing possibilities, the discovery of all elements to be eliminated among the prisoners must proceed step by step at once. . . .

' Above all, the following must be discovered : all important functionaries of State and Party, especially professional revolutionaries . . . all People's Commissars in the Red Army, leading personalities of the State . . . leading personalities of the business world, members of the Soviet Russian Intelligence, all Jews, all persons who are found to be agitators or fanatical Communists. Executions are not to be held in the camp or in the immediate vicinity of the camp . . . The prisoners are to be taken for special treatment if possible into the former Soviet Russian territory.'

" The affidavit of Warlimont, Deputy Chief of Staff of the Wehrmacht, and the testimony of Ohlendorf, former Chief of Amt III of the RSHA, and of Lahousen, the head of one of the sections of the Abwehr, the Wehrmacht's Intelligence Service, all indicate the thoroughness with which this order was carried out. . . .

" In some cases Soviet prisoners of war were branded with a special permanent mark. There was put in evidence the OKW order dated 20th July, 1942, which laid down that :

' The brand is to take the shape of an acute angle of about 45 degrees, with the long side to be 1 cm. in length, pointing upwards and burnt on the left buttock . . . This brand is made with the aid of a lancet available in any military unit. The colouring used is Chinese ink.'

" The carrying out of this order was the responsibility of the military authorities, though it was widely circulated by the Chief of the SIPO and SD to German police officials for information.

" Soviet prisoners of war were also made the subject of medical experiments of the most cruel and inhuman kind. In July, 1943, experimental work was begun in preparation for a campaign of bacteriological warfare ; Soviet prisoners of war were used in these medical experiments, which more often than not proved fatal. . . .

" The argument in defence of the charge with regard to the murder and ill-treatment of Soviet prisoners of war, that the U.S.S.R. was not a party to the Geneva Convention, is quite without foundation. On 15th September, 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, signed by General Reinecke on 8th September, 1941. He then stated :

> ' The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the U.S.S.R. Therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people . . . The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint.'

" This protest, which correctly stated the legal position, was ignored. The defendant Keitel made a note on this memorandum :

> ' The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures.' "

CRIMES AGAINST CIVILIANS

" The territories occupied by Germany were administered in violation of the laws of war. The evidence is quite overwhelming of a systematic rule of violence, brutality, and terror. On 7th December, 1941, Hitler issued the directive since known as the ' Nacht und Nebel Erlass ' (Night and Fog Decree), under which persons who committed offences against the Reich or the German forces in occupied territories, except where the death sentence was certain, were to be taken secretly to Germany and handed over to the SIPO and SD for trial or punishment in Germany. This decree was signed by the defendant Keitel. After these civilians arrived in Germany, no word of them was permitted to reach the country from which they came, or their relatives ; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the family of the arrested person. Hitler's purpose in issuing this decree was stated by the Defendant Keitel in a covering letter, dated 12th December, 1941, to be as follows :

> ' Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany.'

" Even persons who were only suspected of opposing any of the policies of the German occupation authorities were arrested, and on arrest were interrogated by the Gestapo and the SD in the most shameful manner. On 12th June, 1942, the Chief of the SIPO and SD published, through Mueller, the Gestapo Chief, an order authorizing the use of ' third degree ' methods of interrogation, where preliminary investigation had indicated that the person could give information on important matters, such as subversive activities, though not for the purpose of extorting confessions of the prisoner's own crimes. This order provided :

> ' . . . Third degree may, under this supposition, only be employed against Communists, Marxists, Jehovah's Witnesses, saboteurs, terrorists, members of resistance movements, parachute agents, anti-social elements, Polish or Soviet Russian loafers or tramps ; in all other cases my permission must first be obtained . . . Third degree can, according to circumstances, consist among other methods of very simple diet (bread and water), hard bunk, dark cell, deprivation of sleep, exhaustive drilling, also in flogging (for more than twenty strokes a doctor must be consulted).'

" The brutal suppression of all opposition to the German occupation was not confined to severe measures against suspected members of resistance movements themselves, but was also extended to their families. On 19th July, 1944, the Commander of the SIPO and SD in the district of Radom, in Poland, published an order, transmitted through the Higher SS and Police Leaders, to the effect that in all cases of assassination or attempted assassination of Germans, or where saboteurs had destroyed vital installations, not only the guilty person, but also all his or her male relatives should be shot, and female relatives over 16 years of age put into a concentration camp. . . .

" The practice of keeping hostages to prevent and to punish any form of civil disorder was resorted to by the Germans ; an order issued by the defendant Keitel on 16th September, 1941, spoke in terms of fifty or a hundred lives from the occupied areas of the Soviet Union for one German life taken. The order stated that ' it should be remembered that a human life in unsettled countries frequently counts for nothing, and a deterrent effect can be obtained only by unusual severity.' The exact number of persons killed as a result of this policy is not known, but large numbers were killed in France and the other occupied territories in the West, while in the East the slaughter was on an even more extensive scale. In addition to the killing of hostages, entire towns were destroyed in some cases ; such massacres as those of Oradour-sur-Glane in France and Lidice in Czechoslovakia, both of which were described to the Tribunal in detail, are examples of the organized use of terror by the occupying forces to beat down and destroy all opposition to their rule.

" One of the most notorious means of terrorizing the people in occupied territories was the use of concentration camps. They were first established in Germany at the moment of the seizure of power by the Nazi Government. Their original purpose was to imprison without trial all those persons who were opposed to the Government, or who were in any way obnoxious to German authority. With the aid of a secret police force, this practice was

widely extended, and in course of time, concentration camps became places of organized and systematic murder, where millions of people were destroyed.

" In the administration of the occupied territories, the concentration camps were used to destroy all opposition groups. The persons arrested by the Gestapo were as a rule sent to concentration camps. They were conveyed to the camps in many cases without any care whatever being taken for them, and great numbers died on the way. Those who arrived at the camp were subject to systematic cruelty. They were given hard physical labour, inadequate food, clothes and shelter, and were subject at all times to the rigours of a soulless regime, and the private whims of individual guards. . . .

" A certain number of the concentration camps were equipped with gas chambers for the wholesale destruction of the inmates, and with furnaces for the burning of the bodies. Some of them were in fact used for the extermination of Jews as part of the ' final solution ' of the Jewish problem. Most of the non-Jewish inmates were used for labour, although the conditions under which they worked made labour and death almost synonymous terms. Those inmates who became ill and were unable to work, were either destroyed in the gas chambers or sent to special infirmaries, where they were given entirely inadequate medical treatment, worse food if possible than the working inmates, and left to die.

" The murder and ill-treatment of civilian populations reached its height in the treatment of the citizens of the Soviet Union and Poland. Some four weeks before the invasion of Russia began, special task forces of the SIPO and SD, called Einsatz Groups, were formed on the orders of Himmler for the purpose of following the German Armies into Russia, combating partisans and members of Resistance Groups, and exterminating the Jews and Communist leaders and other sections of the population. In the beginning, four such Einsatz Groups were formed, one operating in the Baltic States, one towards Moscow, one towards Kiev, and one operating in the south of Russia. Ohlendorf, former Chief of Amt III of the RSHA, who led the fourth group, stated in his affidavit :

> ' When the German Army invaded Russia, I was leader of Einsatzgruppe D, in the southern sector, and in the course of the year during which I was leader of the Einsatzgruppe D, it liquidated approximately 90,000 men, women, and children. The majority of those liquidated were Jews, but there were also among them some Communist functionaries.'

" In an order issued by the defendant Keitel on 23rd July, 1941, and drafted by the defendant Jodl, it was stated that :

> ' In view of the vast size of the occupied areas in the East, the forces available for establishing security in these areas will be sufficient only if all resistance is punished, not by legal prosecution of the guilty, but by the spreading of such terror by the Armed Forces as is alone appropriate to eradicate every inclination to resist among the population . . . Commanders must find the means of keeping order by applying suitable Draconian measures.'

" The evidence has shown that this order was ruthlessly carried out in the territory of the Soviet Union and in Poland. A significant illustration of the measures actually applied occurs in the document which was sent in 1943 to the defendant Rosenberg by the Reich Commissar for Eastern Territories, who wrote :

> ' It should be possible to avoid atrocities and to bury those who have been liquidated. To lock men, women and children into barns and set fire to them does not appear to be a suitable method of combating bands, even if it is desired to exterminate the population. This method is not worthy of the German cause, and hurts our reputation severely. . . .'

" The foregoing crimes against the civilian population are sufficiently appalling, and yet the evidence shows that at any rate in the East, the mass murders and cruelties were not committed solely for the purpose of stamping out opposition or resistance to the German occupying forces. In Poland and the Soviet Union, these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans. Hitler had written in *Mein Kampf* on these lines, and the plan was clearly stated by Himmler in July, 1942, when he wrote : ' It is not our task to Germanize the East in the old sense, that is, to teach the people there the German language and the German law, but to see to it that only people of purely Germanic blood live in the East.'

" In August, 1942, the policy for the Eastern Territories as laid down by Bormann was summarized by a subordinate of Rosenberg as follows :

> ' The Slavs are to work for us. In so far as we do not need them, they may die. Therefore, compulsory vaccination and Germanic health services are superfluous. The fertility of the Slavs is undesirable.'

" It was Himmler again who stated in October, 1943 :

> ' What happens to a Russian, a Czech, does not interest me in the slightest. What the nations can offer in the way of good blood of our type, we will take. If necessary, by kidnapping their children and raising them here with us. Whether nations live in prosperity or starve to death interests me only in so far as we need them as slaves for our Kultur, otherwise it is of no interest to me.'

" In Poland the intelligentsia had been marked down for extermination as early as September, 1939, and in May, 1940, the defendant Frank wrote in his diary of ' taking advantage of the focussing of world interest on the Western Front, by wholesale liquidation of thousands of Poles, first leading representatives of the Polish intelligentsia.' Earlier, Frank had been directed to reduce the ' entire Polish economy to an absolute minimum necessary for bare existence. The Poles shall be the slaves of the Greater German World Empire.' In January, 1940, he recorded in his diary that ' cheap labour must be removed from the General Government by hundreds of thousands. This will hamper the native biological propagation.' So successfully did the Germans carry out this policy in Poland, that by the end of the war, one third of the population had been killed, and the whole country devastated.

" It was the same story in the occupied area of the Soviet Union. At the time of the launching of the German attack in June, 1941, Rosenberg told his collaborators :

> ' The object of feeding the German people stands this year without a doubt at the top of the list of Germany's claims on the East, and there the southern territories and the northern Caucasus will have to serve as a balance for the feeding of the German people . . . A very extensive evacuation will be necessary, without any doubt, and it is sure that the future will hold very hard years in store for the Russians.' "

(b) *Evidence with Particular Reference to the Commissar Order*

On 30th March, 1941, Hitler held a conference at Berlin with leaders of the Wehrmacht. Von Leeb was present. At that time, according to the summary contained in General Halder's diary, Hitler said :

> " *Clash of two ideologies.* Crushing denunciation of Bolshevism, identified with a social criminality. Communism is an enormous danger for our future. We must forget the concept of comradeship between soldiers. A Communist is no comrade before nor after the battle. This is a war of extermination. If we fail to grasp this, and though we are sure to beat the enemy, we shall again have to fight the Communist foe 30 years from now. We do not wage war to preserve the enemy. . . .
>
> " *War against Russia.* Extermination of the Bolshevist Commissars and of the Communist intelligentsia. The new States must be Socialist, but without intellectual classes of their own. Growth of a new intellectual class must be prevented. A primitive Socialist intelligentsia is all that is needed. We must fight against the poison of disintegration. This is no job for military courts. The individual troop commander must know the issues at stake. They must be leaders in the fight. The troops must fight back with the methods with which they are attacked. Commissars and GPU men are criminals and must be dealt with as such. This need not mean that the troops get out of hand. Rather the commander must give orders which express the common feelings of his troops.
>
> " This war will be very different from the war in the West. In the East, harshness today means leniency in the future. Commanders must make the sacrifice of overcoming their personal scruples."

This seemed to have caused some excitement among those present, who, of course, recognized it as being brutal, murderous and uncivilized. After Hitler had made his speech and had departed to his inner sanctum, protests were uttered by the commanders to the effect that the extermination planned by Hitler would violate their soldierly principles, and, further, would destroy discipline. Brauchitsch agreed with them and promised to express their opinion to the OKW and Hitler respectively. He tried through Keitel to obtain a change in the plans, but was unable to do so. Subsequently, he lent his approval to the objections made by the field commanders, who, in some instances at least, expressed a negative opinion of the order to their subordinates and tried to avoid its execution as far as they could do so without peril to themselves. One of the means to ameliorate the brutality

of the Commissar Order was the issuance by von Brauchitsch of what is known as the " Maintenance of Discipline " order hereafter referred to.

On 6th June, 1941, the Commissar Order was issued from the Fuehrer Headquarters as " TOP SECRET. Transmission only by officer ! " and was captioned, " Directives for the Treatment of Political Commissars." It was as follows :

" In the fight against Bolshevism it is *not* to be expected that the enemy will act in accordance with the principles of Humanity or of the International Law. In particular, a vindictive, cruel and inhuman treatment of our prisoners must be expected on the part of the *political Commissars of all types*, as they are the actual leaders of the resistance.

" The troops must realize :

" (1) In this fight, leniency and considerations of International Law are out of place in dealing with these elements. They constitute a danger for their own safety and the swift pacification of the conquered territories.

" (2) The originators of barbarous Asiatic methods of warfare are the political commissars. They must therefore be dealt with most severely, *at once* and summarily.

" Therefore, they are to be liquidated at once when taken in combat or offering resistance.

" For the rest the following directives will apply :

" I. *Combat Zone*

(1) Political commissars *who oppose our troops* will be treated in accordance with the ' decree concerning the application of martial law in the Barbarossa area.' This applies to commissars of any type and grade, even if they are only suspected of resistance, sabotage or of instigation thereto.

Reference is made to the ' directive concerning the conduct of the troops in Russia.'

(2) Political commissars as *organs of the enemy troops* are recognizable by special insignia—red star with interwoven gold hammer and sickle on the sleeves—(for particulars see ' The Armed Forces of the USSR,' High Command of the Armed Forces/General Staff of the Army, Qu IV, Section Foreign Armies East (II) No. 100/41 secret, of 15th January, 1941, appendix 9 d). They are to be segregated *at once*, e.g. still on the battlefield, from the prisoners of war. This is necessary to prevent them from influencing the prisoners of war in any way. These commissars will not be recognized as soldiers, the protection of prisoners of war by International Law does not apply to them. They will be liquidated after segregation.

(3) *Political commissars who have not committed or are not suspected of hostile acts* will not be harmed for the time being. Only after deeper penetration of the country will it be possible to decide whether officials who were left behind may stay where they are or will be handed over to the Sonderkommandos. Preferably the latter should decide on this point.

As a matter of principle, in deciding the question whether 'guilty or not guilty,' the personal impression which the commissar makes of his mentality and attitude will have precedence over facts which may be unprovable.

(4) In cases 1 and 2, a short message (message form) about the incident will be sent:

(*a*) by divisional units to divisional headquarters (Intelligence Officer).

(*b*) by troops directly under the command of a corps, an army or an army group or a Panzer group, to the respective headquarters (Intelligence Officer).

(5) None of the above-mentioned measures must obstruct the operations. Methodical searches and mopping-up actions, therefore, will not be carried out by the troops.

" II. *In the Communications Zone*

" Commissars who are arrested in the communications zone on account of a doubtful attitude will be handed over to the Einsatzgruppen and/or Einsatzkommandos of the Security Police (Security Service).

" III. *Limitations of Courts-Martial and Summary Courts*

" The courts-martial and summary courts of the regimental and other commanders must not be entrusted with the execution of the measures as per I and II."

On 8th June, 1941, von Brauchitsch sent out a supplement of two additional clauses to be added to the original, viz., to I, Number 1,

" Action taken against a political commissar must be based on the fact that the person in question has shown by a special, recognisable act or attitude that he opposes or will in future oppose the Wehrmacht."

to I, Number 2,

" Political commissars attached to the troops should be segregated and dealt with *by order of an officer*, inconspicuously and *outside the proper battle zone*."

On 24th May, 1941, however, von Brauchitsch formulated the *Maintenance of Discipline* order, in which as a supplement to the Fuehrer Order it is said:

" Subject: Treatment of Enemy Civilians and Criminal Acts of Members of the Wehrmacht against Enemy Civilians.

Attached Fuehrer decree is (hereby) announced. It is to be distributed *in writing* down to the commanders with jurisdiction of their own; beyond that, the principles contained in it are to be made known *orally*.

" *Supplements to I*:

" I expect that all counter intelligence measures of the troops will be carried out energetically, for their own security and the speedy pacification of the territory won. It will be necessary to take into account the

variety of ethnic strains within the population, its overall attitude, and the degree to which they have been stirred up.

" *Movement and combat against the enemy's armed forces are the real tasks of the troops.* It demands the fullest concentration and the highest effort of all forces. This task must not be jeopardized in any place. Therefore, in general, special search and mopping-up operations will be out of question for the combat troops.

" The directives of the Fuehrer concern *serious* cases of rebellion, in which the most severe measures are required.

" *Criminal acts of a minor nature* are, always in accordance with the combat situation, to be punished according to detailed orders from an officer (if possible, a post commander) by resorting to *provisional measures* (for instance), temporary detention at reduced rations, roping-up on a tree, assignment to labour).

" The C.-in-C.'s of the Army Groups are requested to obtain my approval prior to the re-instatement of Wehrmacht jurisdiction in the pacified territories. The C.-in-C.'s of the Armies are expected to make suggestions in this respect in time.

" Special instructions will be issued about the treatment to be given to political dignitaries.

" *Supplements to II*:

" Under all circumstances it will remain the duty of all superiors to prevent arbitrary excesses of *individual* members of the Army and to prevent *in time the troops* becoming unmanageable. It must not come to it that the individual soldier commits or omits any act *he* thinks proper toward the indigenous population ; he must rather feel that in every case he is *bound by the orders of his officers*. I consider it very important that this be clearly understood down to the lowest unit. *Timely action* by every officer, especially every company commander, etc., must *help* to maintain discipline, the basis of our successes.

" Occurrences with regard to ' I ' and ' II,' and which are of special importance, are to be reported by the troops to the OKH as special events.

(*Signed*) VON BRAUCHITSCH."

There were 340 copies of this order, which, as noted, had attached a copy of the Fuehrer Order. This apparently was given wide distribution, although the original Fuehrer Order had a very limited distribution.

It was claimed by the Defence that the Maintenance of Discipline order was conceived by von Brauchitsch as a means of sabotaging the Hitler order, but it will be noted that in the quoted part of Halder's diary he had Hitler saying, " This need not mean that the troops get out of hand."

The record contains a large number of reports showing the execution of commissars by units subordinate to various of the accused.

The evidence showed that the accused von Leeb was present at the meeting held by Hitler in March, 1941, when the proposed extermination of the

commissars was announced. Von Leeb had considered this to be in violation of International Law and also to be unwise in that it tended to defeat its own purpose. He had lodged a protest with von Brauchitsch who had assured him that he would do all he could to prevent the issuance of the order. Nevertheless the order was later issued by the OKW. Not only the accused von Leeb as Commander of Army Group North, but also von Bock of Army Group Centre and von Rundstedt of Army Group South were opposed to the order. When the order was issued, it was directed by the OKW to the armies in these three groups. In other words, the Army Group had nothing to do with the passing on of this order to subordinate units beyond the administrative functions of forwarding it to them. It was also established that the accused von Leeb had discussed this order with his subordinate commanders and let them know of his opposition to it. He had also drawn attention to the Maintenance of Discipline Order issued by von Brauchitsch in an effort to thwart as far as he could the enforcement of the Commissar Order. It was clear from the evidence that the accused von Leeb had protested against the order in every way short of open and defiant refusal to obey it. In spite of his attitude reports of units in the subordinate commands indicated that these commanders had permitted the enforcement of this order and that many of these commissars had been murdered.

As to the accused von Kuechler the evidence showed that he, as commander of the 18th Army, had received this order directly from the OKW together with the von Brauchitsch Maintenance of Discipline Order. He had passed on the Commissar Order to subordinate commanders. Von Kuechler had also attended the above-mentioned meeting with Hitler in March, 1941, and knew of the impending war of ideology or extermination. He testified that he had been opposed to the order, but the evidence in this respect was rather contradictory. The fact remained that he had distributed the order and that it had been enforced by units subordinate to him in the 18th Army. Many reports were made by these units showing that commissars were being executed by them.

The accused Hoth was assigned to Army Group Centre for the war against Russia. He remained as commander of Panzer Group 3 until the 10th October, 1941, when he was appointed Commander-in-Chief of the 17th Army attached to Army Group South. On 15th May, 1942, he was appointed Commander-in-Chief of the 4th Panzer Army in which position he remained until he was transferred to the Fuehrer Reserve in October, 1943. The accused Hoth had also attended the meeting with Hitler in March, 1941. He had received the order from his superior von Brauchitsch and testified that he had simply passed it down without emphasizing it or attempting to mitigate its effect. He did not think that Hitler would ask his commanders to do anything wrong and in any case a directive from Hitler superseded in his opinion Section 48 of the German Military Penal Code which provides that an officer need not carry out an order that is clearly criminal on its face and commits a criminal act if he so does. Numerous reports submitted by his subordinate units indicated that hundreds of commissars had been executed. It was established that several of these reports were seen and signed by the accused Hoth. The evidence left no

doubt that the Commissar Order had been passed down by Hoth and that it had, with his knowledge and approval, been ruthlessly carried out by units subordinate to him.

The accused Reinhardt entered the Russian campaign as Commanding-General of the 41st Panzer Corps subordinated to Army Group North. The evidence showed that he had received the Commissar Order and had communicated it orally to his Divisional Commanders. He testified that when he transmitted it to his divisions, he had directed orally that it was not to be carried out, but the evidence on this point was unclear and conflicting. It was established that he had passed down the order and many reports showed that hundreds of commissars had been executed by his subordinate units in circumstances which clearly imputed knowledge on his part.

The evidence showed that the Commissar Order was received by the accused von Salmuth while he was Commanding General of the XXXth Army Corps. It was shown that it was distributed to subordinate units by him. Von Salmuth testified that he rejected the order and that he had acquainted his divisional commanders with his objections. The evidence did not establish that the order was ever carried out within the XXXth Army Group while it was under the command of the accused.

The accused Hollidt had, as commander of the 50th Infantry Division, received the Commando Order or a similar order in writing. He testified that he had instructed his regimental commanders not to comply with this order.

The only two reports relied upon in evidence as to such executions were ambiguous and unclear and did not suffice to establish any criminal responsibility on his part.

The accused von Roques admitted that he learned of the Commando Order in June or July, 1941. At that time he was Commander of the Rear Area of Army Group South. Later he became Commander of the Rear Area of Army Group A (Caucasus). He denied that he had passed down the order but the evidence on this point was conflicting. There was, however, overwhelming evidence to show that the order had been given a very extensive implementation in his territory. Commissars were regularly shot with his knowledge and he took no action as a result. Numerous orders and reports established that thousands of so-called guerrillas, functionaries and Jews had been executed within his area according to the Commissar Order in circumstances which could leave no doubt that they were carried out with the knowledge, connivance or approval of the accused.

The accused Reinecke was, at the outbreak of the war, Chief of the General Wehrmacht Office (AWA) and remained so until the end of the war. One of the most important sub-sections of this office was that of prisoner-of-war affairs. The evidence established that the accused had general control and responsibility over these matters within the Reich, the General Government, the Reich Commissariat and other areas under the OKW. In June, 1942, the accused signed a decree termed " Policy regarding Commissars and Politruks " which provided for the " elimination " of Commissars and Politruks while within the General Government. It was clear from the

evidence that the accused knew, participated in, and approved of the enforcement of the Commissar Order within his area of authority, in so far as it was applicable to prisoners of war.

The evidence showed that the accused Warlimont, as Chief of the Section of National Defence under the OKW, had taken a substantial part in the preliminary and final phases of the drafting of the Commissar Order. Although it was clear that the idea for the murder of prisoners of war, etc., in the name of ideological warfare did not originate with the accused, the evidence established that he contributed his part to moulding it into its final form. It was distributed " by order " under his signature. There was nothing to indicate that those contributions which he made in any way softened its harshness.

The accused Woehler, as Chief of Staff of the 11th Army, knew of the receipt of the Commissar Order. The evidence did not, however, establish any participation on his part in its transmittal to the subordinate units. He also knew of its enforcement, but as Chief of Staff he had no command authority over subordinate units. Neither did he have any executive power. The evidence failed to show any personal connection on his part with the passing down or execution of the order.

The accused Lehmann was a doctor of law. In July, 1938, he became Chief of the Legal Department of the OKW, which position he held until the capitulation of Germany. The only connection which he was shown by the evidence to have had with the issuance of the Commissar Order, was an immaterial change in the wording of Section 3 as to courts-martial. He had made no material contribution to the preparatory or final drafting of that order.

The accused Sperrle and Schniewind were not involved in, and not charged in connection with, the issuance or implementation of the Commissar Order.

(c) *Evidence with Particular Reference to the Barbarossa Jurisdiction Order*

The so-called Barbarossa Jurisdiction Order was issued by Keitel on 13th May, 1941, as " Decree on Exercising Military Jurisdiction in the Area of Barbarossa and Special Measures by the Troops," and reads as follows :

> " The Wehrmacht's application of its laws (Wehrmachtsgerichtsbarkeit) place at *maintaining discipline.*
>
> " The vast extent of the operational areas in the East, the fighting methods necessitated thereby and the peculiarity of the enemy give the Wehrmacht courts jobs which—in view of their limited personnel—they can only solve during war operations and until some degree of pacification has been obtained in the conquered area if they limit themselves at first to their main task.
>
> " This is possible only if the troops themselves oppose ruthlessly any threat from the enemy population.
>
> " For these reasons herewith the following is ordered for the area ' Barbarossa ' (area of operations, army group rear area, and area of political administration).

I

" *Treatment of Crimes committed by Enemy Civilians*

" (1) Until further order the military courts and the courts-martial will not be competent for *crimes committed by enemy civilians.*

" (2) *Franc-tireurs* will be liquidated ruthlessly by the troops in combat or while fleeing.

" (3) *Also all other attacks by enemy civilians against the Armed Forces,* its members and auxiliaries will be suppressed on the spot by the troops with the most rigorous methods until the assailants are finished. (Niederkaempfen.)

" (4) Where such measures were not taken or at least were not possible, *persons suspected of the act will be brought before an officer at once. This officer will decide whether they are to be shot.*

" Against *localities* from which troops have been attacked in a deceitful or treacherous manner, *collective coercive measures* will be applied immediately upon the order of an officer of the rank of at least battalion, etc., commander, if the circumstances do not permit a quick identification of individual perpetrators.

" (5) It is *strictly forbidden* to *keep* suspects in *custody* in order to put them at the disposal of the courts after the reinstatement of jurisdiction over indigenous inhabitants.

" (6) The C.-in-C.s of the Army Groups can—by agreement with the competent commanders of the Luftwaffe and the Navy—*reinstate jurisdiction of the Wehrmacht courts for civilians,* in areas sufficiently pacified.

" For the *area of the Political Administration* this order will be given by the Chief of the OKW.

II

" *Treatment of crimes committed against inhabitants by members of the Wehrmacht and its auxiliaries.*

" (1) With *regard to offences committed against enemy civilians by members of the Wehrmacht* or by its auxiliaries, *prosecution is not obligatory,* even where the deed is at the same time a military crime or misdemeanour.

" (2) When *judging such offences,* it will be taken into consideration in any type of procedure that the collapse of Germany in 1918, the subsequent sufferings of the German people and the fight against National Socialism which cost the blood of innumerable followers of the movement were caused primarily by bolshevist influence and that no German has forgotten this fact.

" (3) Therefore the judiciary will decide in such case whether *disciplinary punishment* will be appropriate, or whether *prosecution in court* is necessary. In the case of offences against indigenous inhabitants the judiciary will order a prosecution *before the military courts*

only if the maintenance of discipline or the security of the Forces call for such a measure. This applies for instance to serious deeds due to lack of self-control in sexual matters, which originate from a criminal disposition and which indicate that the discipline of the troops is threatening to deteriorate seriously. Crimes which have resulted in senseless destruction of billets or stores or any other kind of captured material to the disadvantage of our Forces will be judged, as a rule, not less severely.

" The *order to start investigation procedure* requires in every single case the signature of the judicial authority.

" (4) *Extreme caution* is required in judging the credibility of statements made by enemy civilians.

III

" *Responsibility of the Troop Commanders*

" In so far as they are competent, it is the *personal* responsibility of the troop commanders to see to it :

" (1) that all officers of the units under their command are instructed in time and in the most emphatic manner about the principles set out under ' I ' above ;

" (2) that their legal advisers are informed *in time* of these rules and *of the verbal communications in which the political intentions of the Supreme Command (Fuehrung) were explained to the C.-in-C.s.*

" (3) that only those sentences will be confirmed which correspond to the political intentions of the Supreme Command (Fuehrung).

IV

" *Protection as secret matter*

" Once the camouflage is lifted this decree will merely have the classification of a *Top Secret.*"

The order was thus divided into two main parts : first, it dispensed with court-martial jurisdiction over the civilian population and provided that civilians in the occupied areas would be subjected to arbitrary punishment upon the decision of an officer. The second part provided that there was no obligation to prosecute members of the Wehrmacht or its auxiliaries who committed crimes against enemy civilians except in cases involving discipline which were restricted to certain types of offences.

The evidence showed that apart from a mass liquidation which occurred at Kowno, no liquidations within the accused von Leeb's area of command had been brought to the attention of the accused. This action, apparently inspired by the Einsatzgruppen, was carried out as a pogrom and was blamed upon a local self-defence organization of Latvians. Hearing of this action, the accused took action to prevent any recurrence of a similar nature within the area of the 18th Army where Kowno was located. The evidence failed to prove that the accused von Leeb knew that the German Government was carrying out an extermination programme or that the activities of the Einsatzgruppen were brought to his knowledge. The reports by

various officers of the Einsatzgruppen on these activities were not sent to von Leeb or through his headquarters but to their superiors in Berlin. Reports containing incidents of illegal executions by the SIPO in connection with security operations were made from subordinate units in von Leeb's command to the Army Group Rear Areas, Armies, and Corps Headquarters. It was not established that these reports were transmitted to the headquarters of the Army Group North or reported to von Leeb by his staff. He did not receive or pass down the Barbarossa Jurisdiction Order.

The evidence showed that the accused von Kuechler received the Barbarossa Jurisdiction Order, that it was disseminated by him without any action on his part to prevent its criminal application and that it was carried out by units under his command. Units subordinate to him summarily executed civilians because they were Communists, gipsies, had an anti-German attitude, on suspicion of aiding partisans, for anti-German propaganda, for listening to Radio Moscow and for spreading rumours of atrocities, for refusing to work, and so on. Summary executions were held after an on-the-spot investigation by an officer, even down to a second lieutenant. Brutality was substituted for judicial process and suspicion took the place of proof. The evidence also showed that with his knowledge and approval some 230 insane and diseased women in an asylum were executed because they were considered " no longer objects with lives worth living according to German conception." On the other hand the evidence did not show any responsibility on the part of von Kuechler in connection with the extermination activities of Einsatzgruppe A within the area of his command.

The evidence established that the accused Hoth received and passed down this order without attaching any safeguards to it. The evidence also showed that the order with his knowledge and approval had been ruthlessly carried out by his subordinate units.

The accused Reinhardt was also shown to have passed down the Barbarossa Jurisdiction Order to his subordinate commanders. On 25th February, 1942, he gave the following directions to his troops: " 6. If weapons are found in the possession of partisans or their partisan activity seems quite obvious, the partisans are to be shot or hung by order of an officer . . . Similar treatment should be given to inhabitants who supported partisans." On 31st July, 1942, he signed an order which, among other things, stated : " the death sentence may be imposed on every tenth man if the ringleader or the especially guilty person cannot be apprehended." These and a number of other orders showed that the Barbarossa Jurisdiction Order had been carried out in the most ruthless way by units under the accused's command, on his orders or with his knowledge or approval. Thousands of persons had been executed within his area of command according to this order.

There was not sufficient evidence to show that the Barbarossa Jurisdiction Order had been transmitted by the accused von Salmuth. The evidence did show, however, that many illegal executions had been carried out by his subordinate units. Numerous reports showed that thousands of "partisans," " suspects " and " agents " had been liquidated. It was not quite clear from the evidence whether or not these executions were carried out according to the Barbarossa Jurisdiction Order in particular but the evidence left no

doubt that they had been carried out with the knowledge, connivance or approval of the accused in close co-operation with all participating German agencies.

As to the accused von Roques, the evidence showed that he had passed this order down to his subordinate units. It also showed that he personally issued other harsh orders in implementation of the Barbarossa Jurisdiction Order or pursuant to it, that numerous " suspects," being " partisans," had been executed without trial and that mass executions had taken place on his orders.

The evidence showed that the accused Warlimont in his capacity as Chief of the Section of National Defence of the OKW was connected with the formulation of the Barbarossa Jurisdiction Order together with the accused Lehmann who was Chief of the Legal Department of the OKW. It was established that Lehmann on the 28th April, 1941, had prepared a draft of the Barbarossa Jurisdiction Order on instructions from Keitel. His original proposal was not accepted but as a result of his discussions with the authorities concerned a final and fourth draft was submitted to Keitel which, with a few minor modifications, was issued over the signature of Keitel and became what was later known as the Barbarossa Jurisdiction Order. It was apparent that the accused Lehmann's idea, for good or evil, became a part of this order. His final draft contained, among other things, the provisions as to collective punishments, which left the door open to the decision of an officer of at least the rank of a battalion commander to impose such collective punishments as he saw fit. The evidence also showed that due to the influence of Lehmann a provision was finally inserted in the order to the effect that troops would dispose of all cases and that courts were to have no jurisdiction whatsoever, whereas General Mueller had urged that troops were to dispose of only those clear cases and that doubtful cases were to be left to the jurisdiction of the courts. In this decision the accused Lehmann was supported by the accused Warlimont. This provision, which did not derive from Hitler or Keitel, was one of the most serious parts of the order. It was clear from the evidence that the accused Lehmann became the main factor in determining the final form of the order.

As to the accused Otto Woehler it was shown by the evidence that the Barbarossa Jurisdiction Order had been received by the 11th Army, but it failed to prove any criminal connection with its distribution on the part of the accused. On 5th September, 1941, however, an order was issued by the 11th Army signed, in pursuance of the Barbarossa Jurisdiction Order, by Woehler as Chief of Staff. This order provided that civilians who are " sufficiently suspected " of certain offences are to be shot including boys and girls. Reports showed that these orders had been carried out.

The evidence did not establish that the Barbarossa Jurisdiction Order was ever transmitted by the accused Hollidt. The order upon which the prosecution based its charge against the accused Hollidt in this respect was a drastic military order for the suppression of partisans and to secure the area of the 5th Infantry Division against guerrilla activities by the population. It may be inferred that this order was derived from the Barbarossa Jurisdiction Order. By implementing this order the accused had, however, placed a limitation upon its enforcement to the effect that only those persons

who were proved by their own confession or by credible evidence to have been guerrillas were to be shot. The evidence did not establish any criminal responsibility on the part of the accused in connection with this order or the Barbarossa Jurisdiction Order.

The evidence showed that the accused Schniewind did not see the Barbarossa Jurisdiction Order before 20th May, 1941. At that time he was Chief of the Naval Command Office and Chief of Staff of the Navy War Staff, a department in the Naval Command Office. He relinquished this command on 12th June, 1941, and the evidence showed that the order was not passed down to subordinate units until 17th June, nearly a week after he had left his command.

The accused Sperrle was not charged with any criminal responsibility in connection with the Barbarossa Jurisdiction Order. The evidence did not show that the accused Reinecke was particularly connected with the preparation, issuing or implementation of this order.

(d) *Evidence with Particular Reference to the Commando Order*

Following the Dieppe raid, Hitler issued the following order on 18th October, 1942:

"TOP SECRET

"(1) For some time our enemies have been using in their warfare methods which are outside the international Geneva Conventions. Especially brutal and treacherous is the behaviour of the so-called commandos, who, as is established, are partially recruited even from freed criminals in enemy countries. From captured orders it is divulged that they are directed not only to shackle prisoners, but also to kill defenceless prisoners on the spot at the moment in which they believe that the latter as prisoners represent a burden in the further pursuit of their purposes or could otherwise be a hindrance. Finally, orders have been found in which the killing of prisoners has been demanded in principle.

"(2) For this reason it was already announced in an addendum to the Armed Forces report of 7th October, 1942, that in the future, Germany, in the face of these sabotage troops of the British and their accomplices, will resort to the same procedure, i.e., that they will be ruthlessly mowed down by the German troops in combat, wherever they may appear.

"(3) I therefore order:

"From now on all enemies on so-called Commando Missions in Europe or Africa challenged by German troops, even if they are to all appearances soldiers in uniform or demolition troops, whether armed or unarmed, in battle or in flight, are to be slaughtered to the last man. It does not make any difference whether they are landed from ships and aeroplanes for their actions, or whether they are dropped by parachute. Even if these individuals, when found, should apparently be prepared to give themselves up, no pardon is to be granted them on principle. In each individual case full information is to be sent to the OKW for publication in the Report of the Military Forces.

"(4) If individual members of such commandos, such as agents, saboteurs, etc., fall into the hands of the military forces by some other means, through the police in occupied territories for instance, they are to be handed over immediately to the SD. Any imprisonment under military guard, in PW stockades for instance, etc., is strictly prohibited, even if this is only intended for a short time.

"(5) This order does not apply to the treatment of any enemy soldiers who, in the course of normal hostilities (large-scale offensive actions, landing operations and airborne operations), are captured in open battle or give themselves up. Nor does this order apply to enemy soldiers falling into our hands after battles at sea, or enemy soldiers trying to save their lives by parachute after battles.

"(6) I will hold responsible under Military Law, for failing to carry out this order, all commanders and officers who either have neglected their duty of instructing the troops about this order, or acted against this order where it was to be executed."

The evidence showed that this order was issued after drafts and changes had been prepared largely by the accused Warlimont and Lehmann. On 7th October, 1942, Hitler made a radio speech in which it was stated:

"All terror and sabotage troops of the British and their accomplices, who do not act like soldiers but like bandits, have in future to be treated as such by the German troops, and they must be slaughtered ruthlessly in combat wherever they turn up."

It appeared that on 8th October, the accused Warlimont was instructed by Jodl to put the announcement in the form of a military order. The accused maintained that he was given detailed instructions with regard to the contents of the order and that it was his intention to sabotage it. There was, however, overwhelming evidence to show that the accused Warlimont had made a substantial contribution to its preparation and that he had speeded up the matter as much as he could. While it appeared that Hitler himself had drawn up the final order, the preparatory work carried out by Warlimont placed before Hitler the ideas which the accused had expressed in his various drafts and part of these were incorporated in the final order. The accused Lehmann's activities in connection with the preparation of the Commando Order were subordinate to those of the accused Warlimont, but the evidence showed that, like Warlimont, the accused Lehmann had in his capacity as staff officer played an essential part in the criminal whole. Although it was not shown that he had contributed to the inherent viciousness of any of the particular provisions of this order, the evidence established that he was one of those responsible for its final production in the form in which it was transmitted to the army. Through the various protests made with respect to the issuing of this order, among others by Admiral Canaris, both Warlimont and Lehmann were shown to be fully aware of its illegal and criminal character.

The accused von Leeb was not involved in or connected with the Commando Order, as he resigned his command on 16th January, 1942.

The Commando Order was transmitted by the OKH directly to the armies as well as to the Army Group North of which the accused von Kuechler

was then in command. The evidence did not show, however, that von Kuechler put this order into the channels of command for subordinate units. The order was not particularly applicable in the eastern area and there was no evidence to show that it was carried out within his command.

The War diary of the 3rd Panzer Army of which the accused Reinhardt was at that time in command, showed that the Commando Order had been received by it. It was further shown that Reinhardt had passed the order down in the chain of command. That the 3rd Panzer Army considered the Commando Order of general application and therefore also applicable in the eastern areas was shown by entries into its War diary to the effect that, until otherwise advised, the order was to be carried out against men in uniform.

The evidence showed that this order as well as Hitler's supplement to it were received by the accused von Salmuth. On the 25th October he transmitted this order for compliance with a covering letter. This letter was signed by his Chief of Staff, on behalf of the Commander-in-Chief. The accused explained that his Chief of Staff should not have signed the letter and was not authorized to do so, but the accused did nothing to repudiate this action, nor did he reprimand him in any way therefor.

It was clear from the evidence that the 17th Army Corps, of which the accused Hollidt was then in command, had received the Commando Order and that the accused had seen it. He stated that he saw no reason to pass on the order and the evidence did not show that he did so or that it was ever carried out by units under his command.

The Commando Order was distributed by SKL to subordinate units on 27th October, 1942. That was after the accused had become Commander of the Fleet. It was sent to his headquarters and his subordinate units. There was no evidence that it was implemented by him or enforced by any units subordinate to him.

The accused von Roques denied that he had distributed the Commando Order but orders issued by the Chief of Staff of the Rear Area Army Group South on the 9th August, 1941, as well as many reports from subordinate units showed that the Commando Order had in fact been implemented and that a great number of uniformed paratroopers had been shot as guerrillas or handed over to the SS for liquidation.

The evidence failed to show that the accused Reinecke had any connection with the execution of this order.

As to the accused Woehler the evidence showed that he, as Chief of Staff of the 11th Army, knew of the receipt and the enforcement of the Commando Order by the 11th Army. It did not, however, show any participation on his part in the transmittal of the order to subordinate units. He had no command authority over subordinate units, nor had he any executive power.

The accused von Sperrle and Hoth were not involved in or charged in connection with the Commando Order.

(e) *Evidence with Particular Reference to the Night and Fog Decree*

The Night and Fog Decree was signed by Keitel on 7th December, 1941, and reads as follows :

" Since the opening of the Russian campaign, Communist elements and other anti-German circles have increased their assaults against the Reich and the occupation power in the occupied territories. The extent and the danger of these activities necessitate the most severe measures against the malefactors in order to intimidate them. To begin with one should proceed along according to the following directives.

I

" In case of criminal acts committed by non-German civilians and which are directed against the Reich or the occupation power endangering their safety or striking power, the death penalty is applicable in principle.

II

" Criminal acts contained in paragraph I will, in principle, be tried in the occupied territories only when it appears probable that death sentences are going to be passed against the offenders, or at least the main offenders, and if the trial and the execution of the death sentence can be carried out without delay. In other cases the offenders, or at least the main offenders, are to be taken to Germany.

III

" Offenders who are being taken to Germany are subject to court-martial procedure there only in case that particular military concerns should require this. German and foreign agencies will declare upon inquiries on such offenders that they were arrested and the state of the proceeding did not allow further information.

IV

" The Commanders-in-Chief in the occupied territories and the justiciaries, within their jurisdiction, will be personally held responsible for the execution of this decree.

V

" The Chief of the OKW will decide in which of the occupied territories this decree shall be applied. He is authorized to furnish explanations, supplements, and to issue directives for its execution. The Reich Minister of Justice will issue directives for the execution within his jurisdiction."

It appeared that this decree was signed by Keitel after prior negotiations with the accused Lehmann and Warlimont. The Night and Fog Decree involved legal questions and the evidence showed that, as in the case of the Barbarossa Jurisdiction Order, the accused Lehmann was the major craftsman of its final form. It was the accused Lehmann who conducted the

negotiations whereby the Ministry of Justice was given the task of trying these persons charged under this decree before the Special Courts and later the People's courts, wherein they were deprived of the rudimentary rights which defendants are usually accorded in the courts of civilized nations.(1) The accused Lehmann pleaded that the original ideas were Hitler's but there seems to be no doubt from the evidence that Lehmann substantially contributed to the final product. The evidence did not suffice to show any criminal connection on the part of the accused Warlimont with this decree.

On the 1st July, 1944, the accused Warlimont sent the following teletype to the chief of the legal department of the OKW (WR), the accused Lehmann :

> " *Subject :* Combating of enemy terrorists in the occupied territories.
>
> " On account of events in Copenhagen, the Fuehrer has decreed that court-martial proceedings against civilians in the occupied territories must be discontinued with immediate effect. WR is requested to submit suggestions for the draft of an order concerning the treatment of enemy terrorists and saboteurs among the civilian population in the occupied territories by 2nd July, 2000 hours.
>
> " *Policies :*
>
> " Terror can be countered only by terror, but court-martial sentences only create martyrs and national heroes.
>
> " If German units or individual soldiers are attacked in any manner, the commander of the unit and/or the individual soldier are bound to take counter measures independently and, in particular, to exterminate terrorists. Terrorists or saboteurs who are arrested later, must be turned over to the SD."
>
> " The Fuehrer Decree on the treatment of enemy Kommandos, dated 18th October, 1942 . . . will remain in force as it does not apply to the civil population."

On the receipt of this order, the accused Lehmann proceeded to make effective this order, which, as it seems apparent from the evidence, bore fruit in the Terror and Sabotage Decree signed by Hitler on 30th July, 1944. In August, 1944, the accused participated in the drafting of the supplement order enlarging the scope of the original decree.

None of the other accused were shown to have been involved in or were charged in connection with the issuance or execution of the Night and Fog Decree.

(f) *Evidence with Particular Reference to Hostages and Reprisals*

The evidence showed that in the instances of so-called hostage takings and killings, and the so-called reprisal killings, which were at issue in the present trial, not even an attempt was made or even suggested as being necessary to meet any judicial safeguards or prerequisites which might possibly have been expected to be required by International Law.

(1) See Vol. VI, p. 8.

On 16th September, 1941, Keitel issued the following directive pertaining to the suppression of the insurgent movement in occupied territories:

" Measures taken up to now to counteract this general communist insurgent movement have proven themselves to be inadequate. The Fuehrer now has ordered that the severest means are to be employed in order to break down this movement in the shortest time possible. Only in this manner, which has always been applied successfully in the history of the extension of power to great peoples can quiet be restored.

" The following directives are to be applied: (a) Each incident of insurrection against the German Wehrmacht, regardless of individual circumstances, must be assumed to be of communist origin. (b) In order to stop these intrigues at their inception, severest measures are to be applied immediately at the first appearance, in order to demonstrate the authority of the occupying power, and in order to prevent further progress. One must keep in mind that a human life frequently counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such case the death penalty for 50 to 100 communists must in general be deemed appropriate as retaliation for the life of a German soldier. The manner of execution must increase the deterrent effect. The reverse procedure—to proceed at first with threat of measures of increased severity as a deterrent does not correspond with these principles and is not to be applied."

The accused Warlimont was charged with participation in the formulation of this so-called Hostage Order. He admitted that he had prepared the original draft but claimed that part of it had been changed by someone without his knowledge. His explanation was, however, not sustained by the evidence. In any case it was established through the accused's admission that one of the paragraphs in his original draft dealt with the number of people who were to be shot in atonement for each German soldier killed. In respect of that number the accused no longer remembered whether the original draft contained the figures 5-10 to one as the ratio established. He submitted his draft to Keitel and Keitel's testimony before the International Military Tribunal regarding this matter merely showed that the ratio number submitted by him to Hitler had been changed by the latter from 5 and 10 to 50 and 100.

The evidence showed that on 1st October, 1941, the accused von Roques received an order from Army Group South which directed:

" (1) Arresting hostages and all men not residing in any villages near the railway line Kasatin-Fastow-Smela-Dnjepropetrowsk, possibly also near the line Alexandrija-Dnjepropetrowsk.

" (2) Hanging hostages at the railway tracks in case of new acts of sabotage.

" (3) In case of further acts of sabotage, complete evacuation of a strip 1-2 km. wide on either side of the railway line and firing on every civilian approaching the railway tracks."

The accused von Roques immediately passed this order down to his subordinate Feldkommandanturen. The evidence did not show that hostages had been shot in his area.

The evidence failed to show any criminal connection on the part of the accused Woehler with the hostage and reprisals orders and killings allegedly carried out within the area of the 11th Army while he was chief of staff.

None of the other accused were charged with criminal responsibility with or involved in these types of crimes.

(g) *Evidence with Particular Reference to the Partisan Warfare*

Among the numerous exhibits there were many documents dealing with the so-called partisan warfare. The evidence leaves the impression that anti-partisan warfare was used by the German Reich as a pretext for the extermination of thousands of innocent persons. In these respects Hitler seemed to have stated the policy adopted by the Wehrmacht when he said:

> ". . . This partisan war again has some advantages for us; it enables us to eradicate everyone who opposes us."

The accused claimed that they did only execute as partisans those who were operating as *franc-tireurs* and bandits and who failed to comply with the requirements of the rules of war and so did not constitute lawful belligerents. The evidence showed, however, that it was the policy of the Wehrmacht to create classes of partisans by definition in orders and directives and by construction and in this manner they brought within the list of those they described as partisans and shot or hanged not only *franc-tireurs*, in fact, but also many innocent categories. Those falling within the various classifications were executed summarily as partisans and so classified in the reports. That applied also to the so-called "partisan suspects" and "every civilian who impedes or incites others to impede the German Wehrmacht."

The Barbarossa Jurisdiction Order was only a part of this policy, and the evidence showed that so-called "partisans," "partisan suspects or sympathizers" and even Red Army soldiers in uniform had been summarily executed by the Wehrmacht or handed over to the SD or other agencies for liquidation more or less as a daily routine. These acts were shown to have been carried out with the knowledge, connivance or approval of the accused von Kuechler, Hoth, Reinhardt, von Salmuth, von Roques and Woehler within their respective areas of command. The evidence failed to show any criminal responsibility in this connection on part of the accused von Leeb, Hollidt and Schniewind. The accused Sperrle and Reinecke were not involved in or charged with this type of crime. As to the accused Warlimont and Lehmann the evidence showed that they had in a criminal way participated in the formulation of various of these orders. The accused Warlimont had also been charged with instituting reprisals particularly against the families of French officers, but although the evidence showed his inhumane attitude towards the innocent members of families of French officers, it failed to prove that he had participated in any criminal acts in this respect.

(h) *Evidence with Particular Reference to Crimes Committed against Prisoners of War*

The evidence showed that apart from the crimes involved in the execution of the Commissar Order, the Barbarossa Jurisdiction Order, the Commando

Order and the Directives applicable to Partisan Warfare, in so far as these orders and directives concerned prisoners of war, a series of other crimes against prisoners of war were committed by the Wehrmacht.

(1) *Murder and ill-treatment of Prisoners of War*

The evidence showed that hundreds of thousands of Russian prisoners of war died from hunger, cold, lack of medical care, and ill-treatment. Later on in the war the German authorities apparently realized that, due to these deplorable conditions and ill-treatment, they had lost for Germany a tremendous source of manpower. Thereafter the treatment of prisoners of war was apparently to some extent based on the principle that it was better to work them to death than merely to let them die. The defence claimed many of these prisoners of war were in a deplorable condition when captured, due to lack of food, poor clothing, wounds, sickness and exhaustion and that these conditions counted for the death of a great number of them. The evidence showed, however, that the great mass of the Russian prisoners of war did not die because of their condition at the time of their capture. The claim of the defence that the German Army did not have sufficient food with which to maintain the prisoners of war, was not sustained by the evidence. It showed that during their progress through Russia the Germans had seized the food supplies of the people and there was no evidence to show that German soldiers at that time were dying from starvation. The evidence showed that in some cases there were epidemics of typhus in the German Army, but nothing to parallel the various epidemics which broke out in the Russian camps. The evidence also showed that, although it happened that soldiers in the German Army died in isolated cases from lack of medical supplies and medical attention, there were thousands of Russian prisoners of war who died from lack of attention. As to the treatment of Russian prisoners of war generally the evidence showed not only that humane treatment was not generally required of German soldiers in dealing with them, but that the directly opposite procedure was imposed upon them by superior orders.

The evidence disclosed numerous reports submitted by the accused von Kuechler's subordinate units showing that a great number of illegal executions of Red Army soldiers had taken place. His own testimony indicated that he was aware of these reports. There was no evidence tending to show any corrective action on his part. It appeared that he not only tolerated such crimes but approved the execution of the orders concerned.

The evidence also showed that the accused von Kuechler as Commander-in-Chief of the 18th Army was guilty of what the Tribunal regarded as criminal neglect of prisoners of war within his area of command. He testified that he had himself visited every prisoner-of-war camp in his area. Reports showed that in one camp " at present 100 men are dying daily." Another report showed that all the inmates of the camp East were expected to die within six months at the latest because the prisoners were treated badly when at work and could not survive on the rations allocated to them. On the other hand the evidence failed to show any such neglect on the part of the accused while he was Commander-in-Chief of Army Group North.

The general conditions of prisoners of war within the accused Hoth's 17th Army area was illustrated by a report submitted by the Oberquartiermeister of his Army on the 25th November, 1941. It reads in part as follows :

" The P.W.s who still are in the Army area at present cannot be evacuated, since they are being required for the activation of P.W.s-companies to be used for railway-maintenance and of P.W.s-construction battalions. . . .

" Since the beginning of operations altogether 236,636 P.W.s were taken by the elements of the Army up to 15th November, 1941. Moreover, 129,904 P.W.s have passed through the installations of the Army who were taken by units not tactically under the command of the Army, so that since the beginning of operations a total of 366,540 P.W.s were made and evacuated. Approximately 400 were shot. As for those who died of natural causes and those escaped, no records are available. . . .

" The rations ordered by decree OKH Gen.Std.H/Gen.Qu. IVa (III, 2) No. I/23728/41 sec., dated 21st October, 1941, could not, of course, be issued to the P.W.s even in a single case. Fat, cheese, soya-bean flour, jam and tea could not always be issued even to our own troops.

" These foodstuffs were replaced by millet, corn, sunflower kernels, buckwheat, in part by lentils and peas, partly also by bread.

" Distribution of the ordered rations, either in full or in part, was not possible simply because rations could not be supplied. The feeding of P.W.s has been possible only from stores found in the country. The cooking of the food causes additional difficulties since only in rare instances field kitchens were brought along by the P.W.s Even our own troops, as a result of the supply difficulties, had to live from the country. The rations due to them had to be cut down by a half for a longer period. . . .

" Clothing is insufficient ; above all shoe-wear. Underwear, in part, is completely lacking. The insufficient clothing is particularly felt during labour employment in the winter.

" Conditions of the clothing situation can only be improved if all dispensable clothing items are being taken away from the P.W.s who are to be released in the rear area of the army group, and placed at the disposal of the armies upon request.

" Repair-shops have been installed in the transit camps which are under the jurisdiction of the army. There is a shortage of material and tools. Deceased and *shot* persons will be buried without their clothes and the clothes used again. (Emphasis supplied). . . .

" In view of the present number of P.W.s, their housing is absolutely impossible. Brick-stoves will be built by the P.W.s themselves. . . .

" After being assigned for labour their health improves since these P.W.s receive supplementary rations. With the existing shortage of fat and albumen, mortality will increase during the winter months.

> Many cases of pneumonia and severe intestinal diseases have occurred. At the evacuation of the huge numbers of P.W.s taken in the battle east of Kiev, where under the worst weather conditions only part of the P.W.s could be sheltered in sheds, one per cent. died each day."

Not all of these conditions could be attributed to Hoth, but as to many of them the evidence left no doubt that they involved the responsibility of this accused. This applied to the neglect that continued after he assumed command in that he held them for labour under such conditions. The evidence also showed that GPU soldiers and " four extremely suspect Red Army men " had been shot by his subordinate units after capture and that prisoners of war had been used as shield for German troops. These acts had been reported to the accused and the reports showed that the killing of prisoners of war for the reasons stated were not mere excesses, but were in accordance with an approved policy. The accused Hoth had taken no steps to counteract these acts.

Reports from units subordinate to the accused Reinhardt showed the hanging of two former Russian soldiers for being friendly to partisans ; the shooting of four Russian prisoners for planning to escape, and of six prisoners of war who had stolen arms and ammunition and tried to escape ; and the shooting of three prisoners of war who could not be removed under the eye of the enemy. It appears that no steps were taken by the accused to counteract such crimes.

On the 25th July, 1941, the OKW issued an order which was transmitted in the chain of command by the accused Salmuth's XXX Corps. It provided that Red Army soldiers " are to be considered guerrillas as from a certain date, to be fixed in each area, and are to be treated as such." The accused von Salmuth was responsible for its transmittal. On the 21st November, 1941, the accused transmitted an order concerning partisans which provided that " every dispersed soldier who is found in the possession of arms in the region of the XXXth AK is to be shot immediately." This order was executed within the command of the accused. Numerous reports from his area of command showed an excessive number of deaths by shooting and otherwise among prisoners of war in circumstances which in the Tribunal's opinion left no doubt that the accused were aware of and criminally responsible for these excesses.

The accused von Roques admitted having read the following report dated 15th October, 1941, from the 24th Infantry Division which was under his command :

> " Devoting every effort to the task, the removal of prisoners proceeds according to order. Insubordination, attempts to escape, and exhaustion of prisoners make the march very difficult. Already there are over 1,000 dead following executions by shooting and exhaustion. In Alexandrija no preparations have been made by PW transit camp 182 for the permanent accommodation of 20,000. Novoukrainka, allegedly only for 10,000."

The evidence showed that the accused von Roques was still in command on the 15th October, 1941, for he had initialed the above-mentioned report

and signed an order, commanding the 24th Infantry Division for its participation in the movement of prisoners of war, under date of 26th October, 1941.

The accused Reinecke was the chief of the General Wehrmacht Office (AWA) under the OKW. One of the most important sub-sections of this office was that of Prisoner of War Affairs, and the evidence showed that the accused had the general control and responsibility over these affairs within the Reich, the General Government, the Reich Commissariat, and other areas under the OKW. Reinecke issued the overall directives to the prisoner-of-war camps within his jurisdiction with which they were bound to comply. Although these directives were always issued " by order " of his superior, Keitel, it was quite clear that the accused as chief of the AWA was not merely one who transcribed the orders of his superior and passed them on. The evidence showed that it was one of his major functions to draft and prepare orders for submission to Keitel for his approval or sign in his name orders in conformity with his known policy. Many of the orders signed by the accused did not bear Keitel's initials showing that they were seen and approved by him, as was usually the procedure when Keitel was present. The evidence showed that the accused had made inspections himself of the prisoner-of-war camps within his jurisdiction and that the camps were constantly being inspected by his subordinates. There was overwhelming evidence to show that he was fully aware of the fact that prisoners of war were murdered in the camps within his jurisdiction and the deplorable conditions under which they lived and the ill-treatment accorded to them. Various inflammatory orders concerning prisoners of war were issued by the accused. On the 24th March, 1942, the OKW/AWA issued the following order:

> " Ruthless and energetic action in cases of unco-operativeness, refusal to work, and negligence in work, especially toward Bolshevist agitators, is to be ordered ; insubordination or active resistance must be completely removed immediately with a weapon (bayonet, gun-butt or firearms, no sticks)." The decree concerning use of arms by the armed forces is to be interpreted strictly. Whoever does not use his weapon or does not use it energetically enough in seeing that an order is carried out is liable to punishment."

On 17th August, 1944, an OKW decree was signed by the accused Reinecke, concerning the treatment of prisoners of war, which provided, *inter alia*:

> " The prisoners of war must definitely know at all times that they will be ruthlessly proceeded against, if necessary with weapons, if they slack in their work, offer passive resistance, or even rebel. . . .
>
> " Minor offences by the guard and auxiliary guard personnel in the treatment of prisoners of war are not to be prosecuted if they serve to help increase production. . . . "

In the programme adopted by the leaders of the Third Reich, they undertook to inspire the German population to murder Allied flyers by lynch law or " mob justice." The evidence showed that the accused Warlimont was well informed on the entire matter. He attended numerous conferences and personally discussed the matter with Kaltenbrunner, one of the active participants in the whole procedure, who informed him that lynch justice was to be the rule. There was also much correspondence, in which he took

a part, with the German Foreign Office and with Goering who was reluctant to consent to participating in this scheme for fear of reprisals. The authors of the plan desired on the one hand to intimidate the enemy and at the same time to cloak its operation in such a manner that it would not result in reprisals. The evidence showed that the accused Warlimont played an active and substantial part in the preparation and formulation of this policy. Goering finally agreed in general to the procedure recommended. As a result of this policy, a great number of allied airmen were either lynched or handed over to the SD for liquidation.

The evidence failed to show any criminal responsibility in this connection on the part of the accused von Leeb, Hollidt and Woehler. The accused Sperrle, Schniewind and Lehmann were not involved in or charged with crimes of this kind.

(2) *Segregation and Liquidation of Prisoners of War in Co-operation with the SD and SIPO*

There was overwhelming evidence to show that the Third Reich at an early stage of the war adopted a programme for the segregation and liquidation of certain categories of prisoners of war. The Commissar Order, the Commando Order, the regulations regarding partisan warfare, lynching and the handing over of allied flyers to the SD for liquidation were only part of this general programme for segregation and liquidation of certain categories of prisoners of war. The liquidations were not confined to political commissars, commando troopers or "terror flyers." The evidence showed that Jewish prisoners of war, those sick and unable to work, those who had escaped and had been recaptured, and prisoners of war of Polish and certain other nationalities who had had sexual intercourse with German women, were also turned over by the Wehrmacht to the Gestapo, SIPO and SD for liquidation.

The evidence showed that the accused Reinecke, as chief of the General Wehrmacht Office under the OKW had taken an active part in the preparation and formulation of this segregation programme and carried it out within the area of his jurisdiction. The accused denied knowledge of this segregation programme, but many orders, some of which were signed by him, left no doubt either as to his participation or as to his knowledge regarding the fate of those prisoners of war who were segregated and handed over to the above-mentioned agencies.

As to the accused von Kuechler, the evidence showed that not only Red Army soldiers, but also escaped prisoners of war had been shot within his area of command with his knowledge, and without any steps having been taken by him to prevent such crimes being carried out.

On the 24th July, 1941, the High Command of the Wehrmacht issued an order for the screening and segregation of Russian prisoners of war in the camps in the zone of operation by which politically untenable and suspicious elements and agitators were to be segregated. An activity report showed that the commander of the rear army, subordinate to the accused Reinhardt, had issued instructions according to this order. Reports showed that the instructions had been carried out. Whether or not the accused Reinhardt

had made himself acquainted with these reports was not quite clear from the evidence, but the fact remained that he had the opportunity to do so.

The evidence showed that also within the area of the accused von Salmuth's command prisoners of war had been handed over to the SD. Thereafter the army had exercised no supervision over them and had apparently no control over them. The circumstances indicate that at the time the accused was aware of the fate which awaited these prisoners.

The remainder of the accused were not connected or charged with any particular crime according to this general programme of segregation and liquidation, although some of them were criminally connected with the specific criminal orders enumerated and dealt with under previous headings.

(3) *The Illegal Use of Prisoners of War for Prohibited Labour*

The evidence showed that orders providing for the use of prisoners of war in dangerous occupations, including the removal of mines, had been issued by the accused von Kuechler's subordinate units. One order dated 29th October, 1941, from the OKW distributed by the 50th Corps of the 18th Army to the 26th Division, provided that " mines other than in the combat or dangerous areas are to be removed by Russian prisoners in order to spare German blood." The evidence also showed that the accused had knowledge of and approved this use of prisoners of war, which the Tribunal regarded as illegal.

The above-mentioned order from the OKW was also transmitted in the area of Army Group North and was implemented in the accused Reinhardt's area. His LIX Corps issued an order providing :

> " If it is suspected that roads or places are mined, prisoners of war or the local population are to walk in front or clear the mines."

Several reports showed that hundreds of prisoners of war had been used for work in supply units in connection with loading of ammunition, for billet and field fortifications and at the front. Their use for such work was so general that it seems to have been the policy of the 3rd Panzer Army under Reinhardt to use prisoners of war for these purposes. Prisoners were also sent to work in the German armament industry. An order signed by the accused Reinhardt as Commander-in-Chief of the 3rd Panzer Army, dated 18th October, 1942, seemed to the Tribunal to confirm this conclusion in every respect. Under the heading, Labour Allocation of Prisoners of War and Civilians, he stated :

> " The urgent need for prisoners of war in the zone of occupation and for the economy and armament industry at home requires a thorough and planned organization of the labour allocation of prisoners of war."

Numerous documents and the testimony of witnesses showed that prisoners of war had, to a large extent, been used for work in the combat area on the eastern fronts by units subordinate to the accused von Salmuth, in circumstances which left no doubt as to his responsibility. This applied also to captured soldiers of the Western Powers on the western fronts.

The evidence showed that units subordinate to the accused Hoth's 17th Army and later units subordinate to his 4th Panzer Army had used hundreds of prisoners of war for labour consisting of road and railroad maintenance

work in construction battalions and for digging anti-tank ditches. They had also been used for loading ammunition. The first-mentioned work was, however, not carried out in dangerous locations.

As to the accused Hollidt, the evidence showed that over a wide period of time, prisoners of war had been used by units subordinate to him for the construction of field fortifications and for labour with combat units. At that time, his army was in the course of retreat which covered some 1,500 kilometres. Reports showed that prisoners of war were in fact killed by an attack from enemy mortars. The use of these prisoners of war took place with the knowledge and approval of the accused.

The evidence showed the use of French prisoners of war within the accused Reinecke's jurisdiction in the manufacture of artillery weapons in the Krupp plants with the knowledge and approval of the accused. It failed to show, however, the actual use of Russian prisoners of war in the manufacture of arms and munitions.

Documentary evidence showed that units subordinate to the accused Woehler, while Commander-in-Chief of the 8th Army, used prisoners of war in the combat area for the construction of field fortifications with the knowledge and acquiescence of the accused.

The evidence failed to show any criminal responsibility in this connection on the part of the accused Sperrle, von Roques and Warlimont. The remainder of the accused, von Leeb, Schniewind and Lehmann were not involved or charged with these kinds of crimes.

(i) *Evidence with Particular Reference to Alleged Acts of Looting, Pillage, Plunder and Spoliation*

The evidence showed that the looting and spoliation which had been carried out in the various occupied countries, were not the acts of individuals, but were carried out by the German Government and the Wehrmacht for the needs of both. It was carried out on a larger scale than was possible by individuals and the strictness of the regulations addressed to individuals in the army, as shown by the evidence, seemed to have been sometimes based upon the idea that in looting, the individual was not depriving the victim of the property, but was depriving the Reich and the Wehrmacht.

On the 17th September, 1940, Keitel issued an order to the military commander in occupied France providing for the illegal seizure of property and its transfer to the Reich. This order reads in part as follows :

"Reichsminister Rosenberg and/or his deputy Reichshauptstellenleiter Ebert has received clear instructions from the Fuehrer personally governing the right of seizure ; he is entitled to transport to Germany cultural goods which appear valuable to him and to safeguard them there. The Fuehrer has reserved for himself the decision as to their use.

"It is requested that the services in question be informed correspondingly."

Pursuant to this order, the accused Reinecke wrote to the Supreme Commander in France on the 10th October, 1940, and requested that the directions given in this directive of Keitel's be transmitted to the military administration

in Belgium. On the 30th October, 1940, he addressed a communication to the Armed Forces Commander in the Netherlands, supplementing this order of Keitel's, a copy of which he sent to Reichsleiter Rosenberg for his information.

The evidence showed that the accused Hollidt had issued a directive that " everything which could be usable to the enemy in the area must be destroyed if no evacuation is possible." In the Tribunal's opinion, it failed to show, however, that these measures were not warranted by military necessity.

On the 11th November, 1941, an order was issued from the 12th Panzer Division, which was under the accused von Leeb's command, directing an operation against certain villages " used by the partisans as a base of operations " with instructions to seize the cattle, horses, and chickens and most of the food. At the same time, however, the order directed a small amount of food to be left for the population at the discretion of the Commander of the operations. Another order of the 39th Corps issued on 7th December, 1941, in connection with a forced retreat, called for the destruction of food and fodder that could not be taken along in the retreat. It seemed, however, that the destruction of these foodstuffs was intended to hamper the advancing enemy and was in the Tribunal's view warranted by military necessity.

The evidence also failed to show any criminal responsibility on the part of the accused von Kuechler, Reinhardt, von Salmuth and Woehler in connection with similar charges of plunder and spoliation brought against them. The accused, Sperrle, Hoth, Schniewind, von Roques and Lehmann were not charged with crimes of this kind.

(j) *Evidence with Particular Reference to the Compulsory Recruitment and Deportation of Slave Labour*

It was conceded that the policy of recruitment of slave labour for the Reich(1) did not originate with the Wehrmacht. It appeared, however, that the Wehrmacht desired this source of labour for its own purposes, and furthermore, it seemed obvious from the evidence that this large-scale programme could not have been effectively carried out without the co-operation of the military authorities in the occupied territories.

The evidence showed beyond question the ruthless manner in which the accused von Kuechler contributed to this criminal programme. On 8th June, 1942, the 285th Security Division reported to the Commander of the Rear Area of the Army Group North as follows :—

> " The moral of the population has been lowered a good deal by the labour allocation to Germany since the recruiting had to be carried on in most cases by imposing a forced quota on the various communities."

A situation report dated 15th March, 1942, to the Commander of the Rear Army of the Army Group North, stated as follows :

> " Of peculiar interest is the seizure of refugees to cover the needs of labour for the Reich and for the fighting troops as well as for the war

(1) See Vol. VII, pp. 29 *et seq.*

plants in the rear army area and Estonia. During the period 28th January-19th February, all in all, sixteen transport trains containing 9,786 persons went to the transit camp in East Prussia. From the area around Sebesch and Idriza on 15th February, 1942, altogether three transport trains with 1,357 persons were sent off. At the present time an additional 1,500 persons, who are gathered in Krasnegwardeisk, are ready for transport."

Even children over ten were considered as labourers. These and other reports, several of which bore the accused's signature, showed clearly the extent to which he had contributed to the enforcement of the forced labour programme of the Reich.

Deportation and enslavement of civilians was also shown to have been carried out on a large scale within the area of the accused Reinhardt's army commands. A report to the 3rd Panzer Army, dated 6th March, 1944, showed the manner of conscription and the attitude of the Army long after the beginning of the war. It read in part as follows :

" Partly the workers are being seized in the streets and under the pretext that they are to work for two-three days. They are being brought to work without any winter clothing, shoes, mess kit and blankets . . . The indigenous auxiliary police fetched the Russians out of their houses at night, but partially these people could buy themselves out of it by giving some alcohol to the indigenous auxiliary policemen. This manner of conscription did not increase the Russians' willingness to work."

The knowledge and attitude of the accused Reinhardt towards the forced labour programme is shown in a letter he signed and sent to the Commanding General of the 43rd Corps on the 28th March, 1943. In this letter he complained of the inefficiency and laziness of the forced workers which he had noticed when touring the area. He then went on :

" . . . The population—which is being subjected to a much greater strain on the Russian side—must be compelled to fulfil my requirements, if necessary through retention of wages, deprivation of food and restraint of personal liberty ; just as I shall call to account any supervisory personnel of any description and rank, if my demands are not enforced. Supervision of workers is a military duty like any other and requires the full efforts of the personnel assigned.

" It is requested that all military superiors and all organs in charge of traffic control and of the maintenance of discipline co-operate with me in the full exploitation of labour of any kind."

The accused Reinhardt's policy with respect to the programme of deportation and enslavement of civilians for labour in the Reich was shown by an order signed by him as Commander-in-Chief of the 3rd Panzer Army, in which he stated :

" The Fuehrer has charged Gauleiter Sauckel with the direction of the entire labour allocation programme reaching into the zone of operations. An intelligent co-operation of the military agencies with the departments of labour allocation administration must make

it possible to mobilize the work capacity of the entire able-bodied population. If success cannot be achieved in any other way, coercive measures must now be applied to recruit the required labour for allocation in the Reich."

This order was given wide distribution throughout his command.

The evidence also showed the personal responsibility of the accused von Salmuth for the forced use of the civilian population in the army area and the illegal recruitment and deportation of civilian slave labour to the Reich to a very great extent, both in the West and in the East. He had personally urged the programme to be carried out and admitted himself that this labour recruitment and deportation was compulsory.

As to the accused Hollidt, the evidence showed that he participated in the recruitment of slave labour for the Reich under the compulsion of orders to do so. He maintained that he was himself opposed to this programme. Nevertheless he carried it out. The evidence showed that his disapproval was based upon the fact that he needed such labour for his own purposes.

Various communications, reports and minutes from conferences showed that the accused Warlimont was not only well aware of, but also actively participated in, the programme of recruitment of forced labour and deportation of civilians for slave labour in the Reich. It was shown that he had attended a conference in the Chancellery, called for the purpose of taking intensive measures for the recruitment of foreign labourers. The minutes of this conference, in pertinent parts, read as follows :

" The deputy of the head of the OKW, General Warlimont, referred to a recently issued Fuehrer Order, according to which all German forces had to place themselves in the service of the work of acquiring manpower. Wherever the Wehrmacht was and was not employed exclusively in pressing military duties (as for example, in the construction of the coastal defences), it would be available, but it could not actually be assigned for the purposes of the GBA. General Warlimont made the following practical suggestions :

" (*a*) The troops employed in fighting partisans are to take over in addition the task of acquiring manpower in the partisan areas. Everyone, who cannot fully prove the purpose of his stay in these areas, is to be seized forcibly.

" (*b*) When large cities, due to the difficulty of providing food, are wholly or partly evacuated, the population suitable for labour commitment is to be put to work with the assistance of the Wehrmacht.

" (*c*) The seizing of labour recruits among the refugees from the areas near the front should be handled especially intensively with the assistance of the Wehrmacht."

Other evidence submitted showed that these suggestions by the accused Warlimont had been put into operation.

The evidence showed that the accused Woehler as Chief of Staff of the 11th Army, issued and signed orders pertaining to the recruitment of forced

labour. The evidence also showed the compulsory and illegal use of civilians under Woehler as Commander-in-Chief of the 8th Army by units subordinate to him. An order signed by his quartermaster on the 25th June, 1944, provided for the compulsory recruitment of civilians and others to the Reich for slave labour in the mines.

The evidence failed to show any criminal responsibility on the part of the accused von Leeb and Sperrle in this connection. The accused Hoth, Schniewind, von Roques, Reinecke and Lehmann were not particularly involved in or charged with crimes of this kind.

(*k*) *Evidence with Particular Reference to the Forced Use of Civilians for Prohibited Work*

The evidence showed that the civilian population had been used for work in danger areas or for other work in the armament industry within the accused von Kuechler's area of command and with his knowledge and approval. They had been used for the fighting troops as well as for war plants in the rear army area and in Estonia.

A report dated 27th November, 1943, from Security Section II to Panzer Army 4 under the accused Hoth's command stated among others :

> " The population of the districts of Tschudnoff and Miropol will supply mine-searching details, which will search the streets constantly for mines . . . Reports concerning . . . mines removed by the population are to be forwarded daily in the Daily Reports to Korueck 585. . . ."

As it was clear, however, that the accused Hoth was temporarily relieved of his command on the 28th November, 1943, it was doubtful whether he had received it or was aware of the facts in which case he would have had no opportunity to countermand it.

The evidence left no doubt that civilians including women and even children had been drafted for work within the accused Reinhardt's area of command. The commander of Korueck 590 stated in a report to the 3rd Panzer Army that 956 men and 2,199 women had been assigned for field fortification construction. Another order directed that these civilians should be used ruthlessly and, if the situation permitted, in the front lines.

A report from a division under the XLIII Corps, dated 30th June, 1943, is illustrative of the conditions under which these civilians worked. The report stated :

> " Already, it happened that civilians assigned to fortification work, who up to now did not receive supplementary rations for heavy work, collapsed due to exhaustion, especially since Russian civilians are being assigned for labour regardless of their physical fitness."

It was quite clear from the evidence that this illegal use of the civilian population was implemented ruthlessly with Reinhardt's knowledge and consent, and even pursuant to his orders.

Numerous documents showed the extensive forced use of the civilian population for work directly concerned with the conduct of the war within

the accused von Salmuth's area of command and that this policy had been strongly urged and implemented by the accused. The same applied to the accused Hollidt.

The evidence failed to show any criminal responsibility on the part of the accused Sperrle, Hoth and Reinecke in connection with such crimes. The accused von Leeb, Schniewind, von Roques, Warlimont, Woehler and Lehmann were not particularly involved in or charged with crimes of this kind.

(l) Evidence with Particular Reference to the Alleged Murder, Ill-treatment, and Persecution of the Civilian Population, Discrimination, Persecution, and Execution of Jews and Co-operation with the Einsatzgruppen and Sonderkommandos of the SIPO and SD

The evidence showed that the accused von Kuechler had directed the enforcement of a decision to execute 230 insane and diseased women inmates of an asylum within his area of command to the SD. It failed to show any other criminal connection on the part of von Kuechler in connection with the extermination activities of Einsatzgruppe A within his area of command. Numerous civilians were, however, summarily executed by units under his command in implementation of the Commissar Order and the Barbarossa Jurisdiction Order with his knowledge and approval. His attitude towards the Jewish question is shown by an order which he issued as early as July, 1940. In this order he stated among other things :

> " 2. I am also stressing the necessity of ensuring that every soldier of the Army, particularly every officer, refrains from criticizing the ethnical struggle being carried out in the GENERAL GOUVERNEMENT, for instance the treatment of the Polish minorities, of the Jews and of church matters. The final ethnical solution of the ethnical struggle which has been raging on the Eastern border for centuries calls for one-time harsh measures.
>
> " Certain units and departments of the Party and the State have been charged with the carrying out of this ethnical struggle in the East.
>
> " The soldiers must, therefore, keep aloof from these concerns of other units and departments. This implies that they must not interfere with those concerns by criticism either.
>
> " It is particularly urgent to initiate immediately the instruction concerning these problems of those soldiers who have been recently transferred from the West to the East ; otherwise, they might become acquainted with rumours and false information concerning the meaning and the purpose of that struggle."

On the 10th October, 1941, the accused von Kuechler, as Commander-in-Chief of the 18th Army, distributed the Reichenau Order concerning the conduct of the German troops in the Eastern areas. This order is quoted in full because it also gives an indication of the attitude adopted towards the civilian population in the Eastern territories :

"*Subject*: Conduct of Troops in Eastern Territories.

" Regarding the conduct of troops towards the Bolshevistic system, vague ideas are still prevalent in many cases. The most essential aim of war against the Jewish-Bolshevistic system is a complete destruction of their means of power and the elimination of Asiatic influence from the European culture. In this connection the troops are facing tasks which exceed the one-sided routine of soldiering. The soldier in the Eastern territories is not merely a fighter according to the rules of the art of war, but also a bearer of ruthless national ideology and the avenger of bestialities which have been inflicted upon Germany and racially related nations.

" Therefore the soldier must have full understanding for the necessity of a severe but just revenge on sub-human Jewry. The Army has to aim at another purpose, i.e., the annihilation of revolts in hinterland, which, as experience proves, have always been caused by Jews.

" The combatting of the enemy behind the front line is still not being taken seriously enough. Treacherous, cruel partisans and unnatural women are still being made prisoners of war, and guerrilla fighters dressed partly in uniforms or plain clothes and vagabonds are still being treated as proper soldiers, and sent to prisoner-of-war camps. In fact, captured Russian officers talk even mockingly about Soviet agents moving openly about the roads and very often eating at German field kitchens. Such an attitude of the troops can only be explained by complete thoughtlessness, so it is now high time for the commanders to clarify the meaning of the pressing struggle.

" The feeding of the natives and of prisoners of war who are not working for the Armed Forces from Army kitchens is an equally misunderstood humanitarian act as is the giving of cigarettes and bread. Things which the people at home can spare under great sacrifices and things which are being brought by the Command to the front under great difficulties, should not be given to the enemy by the soldier not even if they originate from booty. It is an important part of our supply.

" When retreating, the Soviets have often set buildings on fire. The troops should be interested in extinguishing of fires only as far as it is necessary to secure sufficient numbers of billets. Otherwise the disappearance of symbols of the former Bolshevistic rule, even in the form of buildings, is part of the struggle of destruction. Neither historic nor artistic considerations are of any importance in the Eastern territories. The command issues the necessary directives for the securing of raw materials and plants, essential for war economy. The complete disarming of the civilian population in the rear of the fighting troops is imperative considering the long and vulnerable lines of communications. Where possible, captured weapons and ammunition should be stored and guarded. Should this be impossible because of the situation of the battle, the weapons and ammunition will be rendered useless. If isolated partisans are found using firearms in the rear of the Army, drastic measures are to be taken. These measures will be extended to that part of the male population who were in a position to hinder or

report the attacks. The indifference of numerous apparently anti-Soviet elements which originates from a 'wait-and-see' attitude must give way to a clear decision for active collaboration. If not, no one can complain about being judged and treated as a member of the Soviet System.

"The fear of the German counter-measures must be stronger than the threats of the wandering Bolshevistic remnants. Being far from all political considerations of the future, the soldier has to fulfil two tasks:

(1) Complete annihilation of the false Bolshevistic doctrine of the Soviet State and its armed forces.

(2) The pitiless extermination of foreign treachery and cruelty and thus the protection of the lives of military personnel in Russia.

"This is the only way to fulfil our historic task to liberate the German people once for ever from the Asiatic-Jewish danger."

Other orders were issued by the 18th Army requiring Jews to wear distinguishing brassards and placing them in ghettoes, with the knowledge and approval of the accused.

On the 17th November, 1941, the accused Hoth, as Commander-in-Chief of the 17th Army, issued an order in implementation of the same Reichenau Order, which clearly showed his ruthless attitude towards the civilian population. Numerous murders and atrocities were also committed against the civilian population by units under his command pursuant to the Barbarossa Jurisdiction Order and the directives concerning Partisan Warfare with the knowledge, approval or express orders of the accused. The evidence also showed that the SD perpetrated a mass killing of 1,224 Jews, 63 political agitators and 30 saboteurs and partisans on the 14th December, 1941, at Artemousk which was located within the accused's area of command. The accused stated that he had criticised his chief of staff for not advising him that the SD operated within his area. The evidence showed, however, that even after he had acquired knowledge of the activities of the SD within his area of command, his own army police, over whom he had command authority, turned over civilian prisoners and Jews to the SD as a regular practice right up to the time when he relinquished his command.

The evidence showed that the accused Reinhardt knew as early as September, 1941, that the SD was operating within his area of command. It also showed that not only did his army know about the activities of the SD, but also actively co-operated with it in sending suspects of all kinds, including civilian men, women and children. Thousands were in this way sent to Lublin and Auschwitz concentration camps.

On the 1st August, 1941, a Ukrainian woman reported a secret meeting of some 50 local Jews and Bolshevists who, she said, planned to collect and destroy leaflets dropped by German planes requiring the Ukrainian population to resume work in the fields, and to attack the German military officers after the Jews had become strong enough by calling in other persons. As a result the SS Einsatzkommando Xa, stationed in Olschenka, was informed by the XXX Corps of the 11th Army under the accused von Salmuth's command, and assigned the task of preventing the execution of these plans. On the 2nd August, the XXX Corps reported that 400 male persons had been arrested,

mostly Jews ; 98 of them were shot to death outside the village. One hundred and seventy-five were taken hostages and the rest released. The accused denied any participation in or knowledge of this incident, but the evidence seemed to indicate that this was not true. On the 2nd August, he signed an order to his troops concerning the " participation of soldiers in actions against Jews and Communists," which clearly showed that he was fully aware of the activities of the Sonderkommandos within his area of command and provided regulations for the co-operation of the troops in actions of the Sonderkommandos. He also issued express orders for the handing over of " suspected elements who, although they cannot be proved guilty of a serious crime, seem dangerous because of their attitude and behaviour," and therefore should be handed over to the Einsatzgruppen or the Kommandos of the SD. Numerous other documents and reports established his knowledge and the close co-operation of units under his command with the Einsatzgruppen and the Sonderkommandos and the Secret Field Police. As a result of this co-operation, numerous civilians were either murdered, ill-treated or sent to concentration camps for " elimination."

Many documents showed that ill-treatment and persecution of the civilian population took place within the accused von Roques' area of command. Other documents showed the establishment of ghettoes for the Jews ; requirements that they should wear the Star of David ; the prohibition of Jewish rites ; confiscation of Jewish ritual articles, terror killings of suspects and partisan sympathisers ; so-called mopping-up operations and turning over of Jews and Communists to the SD ; orders by the accused Roques himself that troops should not participate in " arbitrary shooting " of Jews and the executive measures of the SD ; orders that all headquarters should help the SD detachments in carrying out its orders from the Reichsfuehrer SS, other than taking part in executions and that " the right to object does not exist for the subordinate headquarters with regard to measures carried out by the SD detachments." These documents and orders left no doubt that the accused von Roques actively supported and participated in the activities of the SD within his area of command. He also handed prisoners of war over to the SD.

The evidence showed that the approximate number of murders committed within the area of the 11th Army, while the accused Woehler was its Chief of Staff was in the neighbourhood of 90,000, including men, women and children. The evidence showed that this murder programme was known in part at least to staff officers under Woehler. Woehler himself denied knowledge of this programme, but Ohlendorf, who was in command of the Einsatzgruppen within this area, testified that he had had various conferences with Woehler. Ohlendorf testified that he had not specifically discussed this matter because he assumed that the accused Woehler was aware of the programme. From this and other evidence it seemed to be beyond doubt that the accused was fully aware of the extermination activities of the Einsatzgruppen within that area. Ohlendorf also testified that he had received co-operation from various units of the Army. Several documents initialed by Woehler and referring to these executions positively proved his knowledge of what was going on. The evidence also showed that the accused had assigned Einsatzgruppen to various localities wherein they

operated and carried out their activities. It was quite clear from the evidence that these orders as to the location of the Einsatzgruppen units were not such basic orders which were issued on the sole authority of the Commander-in-Chief, but were within the sphere of authority of a chief of staff.

As to the accused von Leeb, Hollidt, Reinecke and Warlimont, the evidence failed to show any criminal connection with or participation in the general programme of discrimination, persecution and execution of Jews and the activities of the Einsatzgruppen and Sonderkommandos of the SD, SIPO or the Secret Field Police. The accused Sperrle, Schniewind and Lehmann were not charged with responsibility in connection with this criminal programme.

(*m*) *Evidence with Particular Reference to Alleged Crimes against the Civilian Population in Connection with Evacuation and in Connection with the Retreat of the German Army in the Eastern Territories*

On the 14th February, 1943, the accused von Kuechler distributed over his signature a Fuehrer Order relative to evacuations which provided in part as follows :

" (3) In case of evacuation all men between the ages of 16 and 65 are to be taken along by the troops. Thus the troops will always have manpower for building of entrenchments and prisoners of war will be released for new employment (handing over to Luftwaffe in exchange for men they have released). Then the enemy will be unable, as he is doing now on a large scale, to draft the entire male population as combatants.

" (4) In case of planned evacuations of considerable extent the mass of the civilian population is to be taken along, whenever possible, to be used later as manpower. The villages are then to be destroyed."

On the 21st September, 1943, the Commanding-General of the Security Troops and Commander of the Rear Area of the Army Group North, issued an order which showed the ruthless attitude towards and the hardships accorded to the civilian population during the German retreat in the area of the accused von Kuechler's command. The pertinent parts of the order read as follows :

" *Subject* : Evacuation of the civilian population from the area between the present advanced front line and the Panther Position.

" *Reference* : Commander-in-Chief Army Group North, Ia No. 101/43, top secret military, dated 17th September, 1943 (not distributed).

I. Task

" The Commander-in-Chief of Army Group North has ordered, by reference order, the evacuation of the civilian population from the area between the present advanced front line and the Panther Position. This evacuation is to be carried out extensively and without delay by all means and possibilities available.

II. Supervision

" Pursuant to Special Order the responsibility and supervision of the evacuation of the population rests with the Commander in the Army Area North. For this purpose he is entitled to issue instructions to the armies.

III. Principles to be Applied in the Evacuation

" (1) No usable manpower must be left to the enemy.

" (2) The evacuation will take place mainly in marching convoys of about 1,000 persons each, covering an average of 12-15 km. per day. . . .

" (4) The families will set out in village communities under the direction of the Starost and be escorted by indigenous police.

" (5) During the march, the families are to feed themselves. Only bread is to be distributed on the way. . . .

" (12) Before the setting out of the convoys, the inhabitants will be screened in the starting places, and/or transfer camps, for later labour assignment. See No. IV, A3. For this purpose Gauleiter Sauckel will send a number of representatives to Economy Intendantur North. In order to avoid undesirable effects upon the readiness of the population to be evacuated the able-bodied are to be turned over to the representatives of Gauleiter Sauckel together with their families. As far as they cannot take charge of complete families, the separation of the able-bodied is to take place at the earliest in the receiving camps, but if possible only in the final areas.

" The labour assignment of those evacuated will be partly for operation 'Panther,' partly in the occupied territory, partly in the Reich. It is estimated that 50 per cent. of each convoy are able-bodied. Children over ten are considered as labourers."

On 7th October, 1943, the AOK 18 N O Qu IC Counter Intelligence Officer transmitted to the High Command of the Army Group North Ic Counter Intelligence Officer, a communication concerning evacuation by foot march which refers to this contemplated evacuation, pertinent parts of which read as follows :

" Numerous remarks from the population have been heard in the sense of 'We prefer to be clubbed to death right here than to being evacuated.' Even the population which is basically pro-German suspects rightly that the evacuation by foot march will mean inconceivable misery and will cost innumerable people their health or their lives. . . .

" (3) One must keep clearly in mind that these treks will be trains of misery of the worst kind in spite of the fact that within the army area, on account of the comparatively dense deployment of German troops, it was possible to prepare to some extent the taking care and sheltering of the treks. The horses and vehicles of the population on hand will by far not be sufficient to take care of the people who are unable to march or become unable to march, and to take along the most necessary

amounts of foodstuffs, clothing and household implements. Already up to the collecting camps Luga and Jamburg, the treks will have to cover up to 150 km., therefore, they will be on their way up to two weeks. Considering the state of the clothing, especially the shoes, of the population and the expected weather, the participants of these marches will soon be in an indescribable state, especially the women and children. As far as the availability of any horses and vehicles of their own is concerned, reference is made to the enclosed report of the Orts Kommandant of Lampowo, and it is expressly pointed out that the community of Lampowo is one of the richest and so far best maintained communities in the whole army area."

Notwithstanding this communication to his headquarters, on 30th November, 1943, the defendant signed the following order to the 16th Army :

"(1) The population of the occupied Russian zone East of the Panther has to be *speedily evacuated*, unless they are labour forces required by the Wehrmacht. The able-bodied population in particular has to be seized, eventually even without consideration as to preserving the unity of families, and with horses and cattle to be deported to the territories West of the Panther. As to undesirable elements, suspected of assisting the bands, the organization of special camps in the East is to be waited for. . . .

"(7) The execution of above measures and their continuous supervision is the duty of all Commanders and Offices. They have to be aware of the fact that an omission represents a grave offence, injures the conduct of the war and costs the blood of German men."

Many documents apart from those mentioned above and several of which were signed by the accused von Kuechler showed the ruthless manner in which he evacuated hundreds of thousands of helpless peoples and the inhuman treatment accorded to them.

An order of 12th August, 1943, issued by the 3rd Panzer Army under the accused Reinhardt's command, relating to the evacuation of the Witebsk area contained the following :

"According to Pz AOK. 3, Ia No. 6262/43 secret, it is ordered to evacuate the area designated in the above reference since it was established beyond doubt that the population helped the bands during the operations of the 2nd and 7th Jaeger Battalions. DS Witebsk has declared itself ready to arrange that the population which is to be evacuated will be sent to an SD camp (Lublin)."

Another order issued on the 19th August, 1943, relating to the same evacuation showed that it concerned some 3,000 civilians. The order then goes on :

"The request to SD Witebsk to separate unmistakable band elements in Transit Camp 230 and to take them over for the purpose of accommodating them in Lublin, continues to be upheld.

"Besides properly looking after them and feeding them which has already been ordered, Transit Camp 230 will also see to indoctrinating them with the necessary propaganda, especially also informing them

of the reason for the evacuation—large sections of population aiding the bands ; the innocent ones must suffer with the guilty."

The remainder of the accused were not particularly involved in or charged with such crimes against civilians in connection with evacuation of areas or during the retreat of the armies.

(n) *Evidence with Particular Reference to the Alleged Criminal Conduct by the German Army Under the Accused von Leeb's Command in Connection with the Siege of Leningrad*

The evidence showed that during the siege of Leningrad its defenders and the civilians therein were in great straits and it was feared by commanders of the German Army that the population would undertake to flee through the German lines. Orders were then issued to the effect that the German artillery should be used in order to prevent such an attempt, at the greatest possible distance from the German lines so that the German infantry, if possible, could be spared shooting on civilians. This order was known to and approved by the accused von Leeb.

5. THE JUDGMENT OF THE TRIBUNAL

The Tribunal in its Judgment summarized the progress of the trial and set out a very full summary of the evidence in the case. It also touched upon many legal matters, its words on which, along with its findings, are reproduced in the following pages.(1)

(i) *The Basic Law Applying to the Case.*(2)

Under a heading : *The Basic Law and Law of the Case*, the Tribunal set out two sets of material headed respectively *Control Council Law No.* 10 and *International Treaties*. The paragraphs appearing under the first sub-heading begins :

" The preamble to Control Council Law No. 10 reads as follows :

' In order to give effect to the terms of the Moscow Declaration of 30th October, 1943, and the London Agreement of 8th August, 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows :

Article I

' The Moscow Declaration of 30th October, 1943, " Concerning Responsibility of Hitlerites for Committed Atrocities " and the London Agreement of 8th August, 1945, " Concerning Prosecution and Punishment of Major War Criminals of the European Axis " are made integral

(1) At several points the Tribunal quoted lengthy passages from the *Judgment of the International Military Tribunal.* In the interests of space some such passages are omitted from the paragraphs which follow, references being given to the edition of the *Judgment of the International Military Tribunal*, published as British Command Paper Cmd. 6964.

(2) Regarding the United States law and practice relating to the trial of war criminals, see, in general, Vol. III of these Reports, pp. 103-20.

parts of this law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany.

Article II

' 1. Each of the following acts is recognized as a crime :

' (*a*) *Crimes against Peace.* Initiation of invasions of other countries and wars of aggression in violation of International Laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

' (*b*) *War Crimes.* Atrocities or offences against persons or property constituting violations of the laws or customs of war, including, but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property ; wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

' (*c*) *Crimes against Humanity.* Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious ground whether or not in violation of the domestic laws of the country where perpetrated.

' (*d*) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

' 2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (*a*) a principal, or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same, or (*c*) took a consenting part therein, or (*d*) was connected with plans or enterprises involving its commission or (*e*) was a member of any organization or group connected with the commission of any such crime, or (*f*) with reference to paragraph 1 (*a*), if he held a high political, civil or military (including General Staff) position in Germany or in one of its allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.' "

The Tribunal then quoted the entire section headed " The Law of the Charter " from the Judgment of the International Military Tribunal,[1] in which the latter is mainly concerned to show that its Charter was " the expression of International Law existing at the time of its creation " and that " International Law imposes duties and liabilities upon individuals as

(1) See British Command Paper Cmd. 6964, pp. 38-42.

well as upon States," in consequence of which the former may be made criminally responsible for their acts ; the International Military Tribunal took special pains to show that the provisions of the Charter as to crimes against peace did not violate the principle *nullum crimen sine lege, nulla poena sine lege*, even if that maxim were deemed applicable.(1)

The Tribunal expressed the view that:

" This reasoning applies also to Control Council Law No. 10. The same authority creating the London Agreement created this Control Council Law. As was said by Tribunal III in the Justice Case :(2)

> ' It can scarcely be argued that a Court which owes its existence and jurisdiction solely to the provisions of a given statute could assume to exercise that jurisdiction and then, in the exercise thereof, declare invalid the act to which it owes its existence. Except as an aid to construction we cannot and need not go behind the statute.'

" The Charter, supplemented by Control Council Law No. 10, is not an arbitrary exercise of power, but ' *it is the expression of International Law existing at the time of its creation ;* and to that extent is itself a contribution to International Law.' (Emphasis supplied, Judgment, IMT, *supra.*) As a matter of interest to students we might point out that this general principle is sustained by the following extract from Grotius, written in 1625 :

> ' It is proper also to observe that Kings and those who are possessed of sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for *gross-violations of the law of nature and of nations, done to other states and subjects.*' (Grotius, *The Rights of War and Peace*, translated from the Latin by A. C. Campbell, A.M. (1901) M. Walter Dume, publisher, Washington and London, Cap. XX, p. 247.)

" We also refer to an article from the *Manchester Guardian* of 28th September, 1946, containing a description of the trial of Sir Peter of Hagenbach held at Breisach in 1474. The charges against him were analogous to ' Crimes against Humanity ' in modern concept. He was convicted.

" However, these citations are of academic interest only, merely given to show the soundness of the Judgment of the IMT. We think it may be said the basic law before mentioned simply declared, developed, and implemented International Common Law.

" By so construing it, there is eliminated the assault made upon it as being an *ex post facto* enactment.

" Our view is fortified by the judgment rendered in Case No. 7, U.S. vs. Wilhelm List, *et al*,(3) where (p. 10434) it is said :

> ' We conclude that *pre-existing International Law* has declared the acts constituting the crimes HEREIN CHARGED and included in Control Council Law No. 10 to be unlawful, both under the conventional law and the practices and usages of land warfare that had ripened into

(1) As to this maxim compare Vol. IX, pp. 32-9.
(2) A report on this trial is contained in Vol. VI of these Reports, pp. 1-110.
(3) Reported in Vol. VIII of these Reports, pp. 34-92.

recognized customs which belligerents were bound to obey. Anything in excess of existing International Law therein contained is a utilization of power and not of law. It is true, of course, that courts authorized to hear such cases were not established nor the penalties to be imposed for the violations set forth. But this is not fatal to their validity. The acts prohibited are without deterrent effect unless they are punishable as crimes.' (Emphasis supplied.) . . .

" Many of the questions in the IMT case are presented in this case. The same unlawful orders, acts, and practices are involved ; only the defendants are different. Hitler was the very centre of vast expanding concentric rings of influence that touched every person in Germany. The defendants in this case are only one or two stops removed from Goering, Keitel, Jodl, Doenitz, and Raeder, defendants in the IMT case. Much of the evidence introduced in this case was introduced in the IMT hearing. Consequently, the great importance of the judgment of that trial, as applying to the issues of law involved in this case, is readily apparent.

" The IMT Judgment contains an elaborate account of Hitler's rise to power, the plans and acts of aggression, and the barbarities and crimes perpetrated upon the armed forces and civilians of the countries with which Germany was at war. In view of the fact that these general findings are supported by the record in the instant case, we shall make further liberal quotations from and references to it in this judgment."(1)

Under the second subheading, INTERNATIONAL TREATIES, the Tribunal quoted the section of the Judgment of the International Military Tribunal which appears immediately before that last quoted, and which is headed " Violations of International Treaties."(2) Here the latter court, having pointed out that " The Charter defines as a crime the planning or waging of war that is a war of aggression *or a war in violation of international treaties*,(3) refers to violations by Germany of the most important of these treaties that were in fact broken by that State.

(ii) *Objections During the Trial*

Under this heading the Tribunal made the following remarks :

" The objection has been raised that this Tribunal is not a proper forum in which to try the defendants for the crimes charged. It is said that they were prisoners of war and that they are subject to trial only by a general court-martial. We find no merit in such contention.

" There is no doubt of the criminality of the acts with which the defendants are charged. They are based on violations of International Law well recognized and existing at the time of their commission. True no court had been set up for the trial of violations of International Law. A State

(1) Regarding the relationship between the International Military Tribunal and the United States Military Tribunals, see also Vol. IX, pp. 54-7.
(2) See Cmd. 6964, pp. 36-8.
(3) Italics inserted.

having enacted a criminal law may set up one or any number of courts and vest each with jurisdiction to try an offender against its internal laws. Even after the crime is charged to have been committed we know of no principle of justice that would give the defendant a vested right to a trial only in an existing forum. In the exercise of its sovereignty the State has the right to set up a Tribunal at any time it sees fit and confer jurisdiction on it to try violators of its criminal laws. The only obligation a sovereign State owes to the violator of one of its laws is to give him a fair trial in a forum where he may have counsel to represent him—where he may produce witnesses in his behalf and where he may speak in his own defence. Similarly, a defendant charged with a violation of International Law is in no sense done an injustice if he is accorded the same rights and privileges.(1) The defendants in this case have been accorded those rights and privileges.

" As regards the contention that the defendants are prisoners of war and that the Geneva Convention, Article 63, requires that a prisoner of war be tried by a general court-martial we call attention to the fact that this provision referred to is found in an international agreement, that was entered into and to which both the United States and Germany were signatories, to protect prisoners of war after they acquire such status and not to extend to them any special rights or prerogatives with respect to crimes they may have committed before acquiring a prisoner-of-war status. Such is the reasoning of the Yamashita Case, 327 U.S. 1 : 66 Sup. Ct. 348.(2) We think the reasoning sound.

" Article 63 of the Geneva Convention provides :

> ' Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power.'

Therefore, say defence counsel, the defendants must be tried by a general court-martial since the defendants were prisoners of war taken by the United States and members in the armed forces of the United States committing crimes are tryable by court-martial. But the trial of men in the military forces of the United States by court-martial can be only for crimes committed after the accused acquires and during the time he possesses the status of a member of the armed forces of the United States. One who committed murder and thereby violated the law of the State before he was inducted into the military service clearly could not be tried for that crime by a court-martial for violating articles of war which did not apply to him when he committed the murder.

" Nor do we think it necessary that defendants be discharged as prisoners of war before being brought to trial. Certainly if a man is arrested for violating a municipal traffic ordinance which subjects him only to a civil penalty in a magistrate's court and while he is in custody it is discovered that the day before he committed a murder, there is no violation of any principle of justice in holding him in custody and surrendering him to the officers of a court that has competency to try him for murder.

(1) Regarding the rights of alleged war criminals, including war traitors, and of prisoners of war, to a fair trial, see Vol. V of these Reports, pp. 70-81, and Vol. VI, pp. 96-104.

(2) Reported in Vol. IV of this series, pp. 1-96. Regarding the plea under treatment see especially pp. 46, 69 and 78 of Vol. IV.

" We are not deciding whether the United States or France or any other nation lawfully could or could not try the defendants in a court-martial for a violation of International Law. That is not before us. If that may be done, a court-martial has not exclusive jurisdiction.

" The crimes including the war crimes charged against the defendants are for violations of International Criminal Law. This Tribunal by Control Council Law No. 10 is vested with authority to try defendants for the crimes charged. That such jurisdiction possibly may be exercised by another military court also is of no consequence. If two courts have concurrent jurisdiction to try the same case the first court that exercises jurisdiction may properly dispose of the case.

" The IMT said :

> ' The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal. . . .
>
> ' The Tribunal is of course bound by the Charter and the definition which it gives of war crimes and crimes against humanity ' (*Trial of the Major War Criminals*, Vol. I, pp. 218, 253).

" What was held by the IMT with respect to the London Agreement and Charter, the basic laws under which it functioned, is authority for a similar holding by this Tribunal with respect to the basic law under which it was set up and under which it functions.

" We deem it unnecessary to discuss the objection that Control Council Law No. 10 is in violation of the maxim *nullum crimen sine lege ; nulla poena sine lege*. We find it without merit. It has been passed upon so many times by the Nuremberg Tribunals and held without merit, that further comment here is unnecessary.(1)

" The further objection was made that one of the nations, namely the USSR, co-operated in the promulgation of Control Council Law No. 10 after it had engaged in a war of aggression which is made criminal under the law ; this objection also is without merit. The London Agreement and Charter from which Control Council Law No. 10 stems has been approved by nineteen nations other than the four signatories thereto. We need not and do not determine whether the charge that one of the signatories of the London Agreement and Charter and Control Council Law No. 10 is guilty of aggressive war for such determination could avail the defendants nothing. Under general principles of law, an accused does not exculpate himself from a crime by showing that another committed a similar crime, either before or after the alleged commission of the crime by the accused.

" Various of the defendants by way of objection or motions have raised the question of the sufficiency of the evidence on the part of the prosecution to make out a *prima facie* case of the guilt of the respective defendants. Numbers of these motions were ruled upon during the course of the trial. As to such motions not heretofore ruled upon, the same are denied, inasmuch

(1) See especially Vol. IX, pp. 32-5.

as the questions raised by such motions are involved in the final determination of the guilt or the innocence of the defendants."

(iii) *The Dismissal of the Conspiracy Count*

The Tribunal dealt with Count IV of the Indictment in the following words :

" In view of the conclusions presently to be announced, we think it proper now to dispose of this count.

" We have heretofore set out paragraph 2 of Article II of Control Council Law No. 10, which provides that any person who was an accessory to the commission of Crimes against Peace, War Crimes, or Crimes against Humanity, as defined in said law by Article II, Sec. 1, paragraphs (*a*), (*b*), and (*c*), or who ordered or abetted such offence, or took a consenting part therein, or who was connected with any plans or enterprises involving its commission should be deemed guilty of the commission of said offences. It is difficult to see, as the facts have developed in this case, how a conspiracy charge can be of the slightest aid to the prosecution. If the defendants committed the acts charged in this conspiracy count, they are guilty of crimes charged under Counts I, II, and III and are punishable as principals.

" The conspiracy count has not resulted in the introduction of any evidence that is not admissible under the other counts, nor does it, as the evidence has developed in this case, impose any criminality not attached to a violation under such preceding counts.

" Inasmuch as we hold that under the facts of this case no separate substantive offence is shown under Count IV, we strike it as tendering no issue not contained in the preceding counts, and proceed to determine the guilt or innocence of the defendants under Counts I, II, and III of the Indictment.

" In so striking Count IV, we have reference only to the facts as they have been presented in this case and express no opinion as to whether in all cases and under all factual developments the charge of conspiracy should be disregarded. Such determination should depend upon the proof adduced in each case.[1]

" In this connection we desire to advert to the last paragraph of Section 2, Article II, Control Council Law No. 10, viz., ' or (f) with reference to paragraph 1 (a) if he held a high political, civil, or military (including General Staff) position . . . or held *high* position in the financial, industrial or economic life ' in Germany, such person would be guilty under paragraph 1 (a) defining Crimes against Peace.[2]

" The prosecution does not undertake to fix liability upon this basis and we need not notice it further than to observe that we may draw from any known facts such inferences as we deem they warrant."

(iv) *Count I of the Indictment—Aggressive War : Finding of Not Guilty*

[1] See also a decision of a joint meeting of the Tribunals on the question of conspiracy *to commit War Crimes and Crimes against Humanity* viewed as a separate offence, reported in Vol. VI of these Reports, pp. 5-6 and 104-10.

[2] For the complete text of Article II (2), see p. 60.

The Tribunal pointed out that: " Count I of the Indictment, heretofore set out, charges the defendants with Crimes against Peace." The Judgment in dealing with this count, continues as follows:

" Before seeking to determine the law applicable it is necessary to determine with certainty the action which the defendants are alleged to have taken that constitutes the crime. As a preliminary to that we deem it necessary to give a brief consideration to the nature and characteristics of war. We need not attempt a definition that is all inclusive and all exclusive. It is sufficient to say that war is the exerting of violence by one state or politically organized body against another. In other words, it is the implementation of a political policy by means of violence. Wars are contests by force between political units but the policy that brings about their initiation is made and the actual waging of them is done by individuals. What we have said thus far is equally as applicable to a just as to an unjust war, to the initiation of an aggressive and, therefore, criminal war as to the waging of defensive and, therefore, legitimate war against criminal aggression. The point we stress is that war activity is the implementation of a predetermined national policy.

" Likewise, an invasion of one state by another is the implementation of the national policy of the invading state by force even though the invaded state, due to fear or a sense of the futility of resistance in the face of superior force, adopts a policy of non-resistance and thus prevents the occurrence of any actual combat.

" In the light of this general characterization and definition of war and invasions we now consider the charge contained in the Indictment. The essence of the charge is *participation in the initiation of aggressive invasions and in the planning, preparation and waging of aggressive wars.* The remaining parts of paragraph 1 are merely a statement of particular actions which are sufficient to constitute a commission of the crime charged. Paragraph 2 charges that the defendants were principals, or accessories to, or were in other ways involved in, the commission of the previously charged Crimes against Peace. These are charges as to the nature of their relationship to the crime otherwise charged in the Indictment, and add no new element to the criminality charged in paragraph 1. The reference in paragraph 2 to the high military positions formerly held by the defendants has relevance in the Indictment and in the law (Control Council Law No. 10, Art. II, Sec. 2), not to show or charge additional Crimes against Peace, but to show what persons may be included and what persons may not be excluded from being charged and convicted of the offence set forth in Sec. 1a.

" The prosecution does not seek, or contend that the law authorizes, a conviction of the defendants simply by reason of their positions as shown by the evidence, but it contends only that such positions may be considered by the Tribunal with all other evidence in the case for such light as they may shed on the personal guilt or innocence of the individual defendants. The prosecution does contend, and we think the contention sound, that the defendants are not relieved of responsibility for action which would be criminal in one who held no military position, simply by reason of their military positions. This is the clear holding of the Judgment of the IMT, and is so provided in Control Council Law No. 10, Art. II, Sec. 4a.

" The initiation of war or an invasion is a unilateral operation. When war is formally declared or the first shot is fired the initiation of the war has ended and from then on there is a waging of war between the two adversaries. Whether a war be lawful, or aggressive and therefore unlawful under International Law, is and can be determined only from a consideration of the factors that entered into its initiation. In the intent and purpose for which it is planned, prepared, initiated and waged is to be found its lawfulness or unlawfulness.

" As we have pointed out, war whether it be lawful or unlawful is the implementation of a national policy. If the policy under which it is initiated is criminal in its intent and purpose it is so because the individuals at the policy-making level had a criminal intent and purpose in determining the policy. If war is the means by which the criminal objective is to be attained then the waging of the war is but an implementation of the policy, and the criminality which attaches to the waging of an aggressive war should be confined to those who participate in it at the policy level.

" This does not mean that the Tribunal subscribes to the contention made in this trial that since Hitler was the Dictator of the Third Reich and that he was supreme in both the civil and military fields he alone must bear criminal responsibility for political and military policies. No matter how absolute his authority, Hitler alone could not formulate a policy of aggressive war and alone implement that policy by preparing, planning, and waging such a war. Somewhere between the Dictator and Supreme Commander of the Military Forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it. Control Council Law No. 10 does not definitely draw such a line. It points out in Sec. 2 of Article II certain fact situations and established relations that are or may be sufficient to constitute guilt and sets forth certain categories of activity that do not establish immunity from criminality. Since there has been no other prosecution under Control Council Law No. 10 with defendants in the same category as those in this case, no such definite line has been judicially drawn. This Tribunal is not required to fix a general rule but only to determine the guilt or innocence of the present defendants.

" The Judgment of the IMT held that (page 48) :

> ' The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in view of the Tribunal, as will be shown, it is the expression of International Law existing at the time of its creation ; and to that extent is itself a contribution to International Law.'

" We hold that Control Council Law No. 10 likewise is but an expression of International Law existing at the time of its creation. We cannot therefore construe it as extending the International Common Law as it existed at the time of the Charter to add thereto any new element of criminality, for so to do would give it an *ex post facto* effect which we do not construe it to have intended. Moreover, that this was not intended is indicated by the fact that the London Charter of 10th August, 1945, is made an integral part of the Control Council Law.

" Since International Common Law grows out of the common reactions and the composite thinking with respect to recurring situations by the various states composing the family of nations, it is pertinent to consider the general attitude of the citizens of states with respect to their military commanders and their obligations when their nations plan, prepare for and initiate or engage in war.

" While it is undoubtedly true that International Common Law in case of conflict with State Law takes precedence over it and while it is equally true that absolute unanimity among all the states in the family of nations is not required to bring an International Common Law into being, it is scarcely a tenable proposition that International Common Law will run counter to the consensus within any considerable number of nations.

" Furthermore, we must not confuse idealistic objectives with realities. The world has not arrived at a state of civilization such that it can dispense with fleets, armies, and air forces, nor has it arrived at a point where it can safely outlaw war under any and all circumstances and situations. Inasmuch as all war cannot be considered outlawed then armed forces are lawful instrumentalities of state, which have internationally legitimate functions. An unlawful war of aggression connotes of necessity a lawful war of defence against aggression. There is no general criterion under International Common Law for determining the extent to which a nation may arm and prepare for war. As long as there is no aggressive intent, there is no evil inherent in a nation making itself militarily strong. An example is Switzerland which for her geographical extent, her population and resources is proportionally stronger militarily than many nations of the world. She uses her military strength to implement a national policy that seeks peace and to maintain her borders against aggression.

" There have been nations that have initiated and waged aggressive wars through long periods of history ; doubtless there are nations still disposed to do so ; and if not, judging in the light of history, there may be nations which to-morrow will be disposed so to do. Furthermore, situations may arise in which the question whether the war is or is not aggressive is doubtful and uncertain. We may safely assume that the general and considered opinions of the people within states—the source from which International Common Law springs—are not such as to hamper or render them impotent to do the things they deem necessary for their national protection.

" We are of the opinion that as in ordinary criminal cases, so in the crime denominated aggressive war, the same elements must all be present to constitute criminality. There first must be actual knowledge that an aggressive war is intended and that if launched it will be an aggressive war. But mere knowledge is not sufficient to make participation even by high-ranking military officers in the war criminal. It requires in addition that the possessor of such knowledge, after he acquires it shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it. If he then does the former, he becomes criminally responsible ; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy.

"If a defendant did not know that the planning and preparation for invasions and wars in which he was involved were concrete plans and preparations for aggressive wars and for wars otherwise in violation of international laws and treaties, then he cannot be guilty of an offence. If, however, after the policy to initiate and wage aggressive wars was formulated, a defendant came into possession of knowledge that the invasions and wars to be waged were aggressive and unlawful, then he will be criminally responsible if he, being on the policy level, could have influenced such policy and failed to do so.

" If and as long as a member of the armed forces does not participate in the preparation, planning, initiating or waging of aggressive war on a policy level, his war activities do not fall under the definition of Crimes against Peace. It is not a person's rank or status, but his power to shape or influence the policy of his State, which is the relevant issue for determining his criminality under the charge of Crimes against Peace.

" International Law condemns those who, due to their actual power to shape and influence the policy of their nation, prepare for, or lead their country into or in an aggressive war. But we do not find that, at the present stage of development, International Law declares as criminals those below that level who, in the execution of this war policy, act as the instruments of the policy makers. Anybody who is on the policy level and participates in the war policy is liable to punishment. But those under them cannot be punished for the crimes of others. The misdeed of the policy makers is all the greater in as much as they use the great mass of the soldiers and officers to carry out an international crime ; however, the individual soldier or officer below the policy level is but the policy makers' instrument, finding himself, as he does, under the rigid discipline which is necessary for and peculiar to military organization.

" We do not hesitate to state that it would have been eminently desirable had the Commanders of the German Armed Forces refused to implement the policy of the Third Reich by means of aggressive war. It would have been creditable to them not to contribute to the cataclysmic catastrophe. This would have been the honourable and righteous thing to do ; it would have been in the interest of their State. Had they done so they would have served their fatherland and humanity also. But however much their failure is morally reprimandable, we are of the opinion and hold that International Common Law, at the time they so acted, had not developed to the point of making the participation of military officers below the policy-making or policy-influencing level into a criminal offence in and of itself.

" International Law operates as a restriction and limitation on the sovereignty of nations. It may also limit the obligations which individuals owe to their states, and create for them international obligations which are binding upon them to an extent that they must be carried out even if to do so violates a positive law or directive of state. But the limitation which International Common Law imposes on national sovereignty, or on individual obligations, is a limitation self-imposed or imposed by the composite thinking in the international community, for it is by such democratic processes that Common Law comes into being. If there is no generality of opinion among the nations of the world as to a particular

restriction on national sovereignty or on the obligations of individuals toward their own state, then there is no International Common Law on such matter.

" By the Kellogg-Briand Pact the sixty-three signatory nations including Germany, renounced war as an instrument of *National Policy*. If this, as we believe it is, is evidence of a sufficient crystallization of world opinion to authorize a judicial finding that there exist Crimes against Peace under International Common Law, we cannot find that law to extend further than such evidence indicates. The nations that entered into the Kellogg-Briand Pact considered it imperative that existing international relationships should not be changed by force. In the preamble they state that they are:

> '. . . persuaded that the time has come when . . . all changes in their relationships with one another should be sought only by pacific means.'

" This is a declaration that from that time forward each of the signatory nations should be deemed to possess and to have the right to exercise all the privileges and powers of a sovereign nation within the limitations of International Law, free from all interference by force on the part of any other nation. As a corollary to this, the changing or attempting to change the international relationships by force of arms is an act of aggression and if the aggression results in war, the war is an aggressive war. It is, therefore, aggressive war that is renounced by the pact. It is aggressive war that is criminal under International Law.

" The crime denounced by the law is the use of war as an instrument of national policy. Those who commit the crime are those who participate at the policy-making level in planning, preparing, or in initiating war. After war is initiated, and is being waged, the policy question then involved becomes one of extending, continuing or discontinuing the war. The crime at this stage likewise must be committed at the policy-making level.

" The making of a national policy is essentially political, though it may require, and of necessity does require, if war is to be one element of that policy, a consideration of matters military as well as matters political.

" It is self evident that national policies are made by men. When men make a policy that is criminal under International Law, they are criminally responsible for so doing. This is the logical and inescapable conclusion.

" The acts of Commanders and Staff Officers below the policy level, in planning campaigns, preparing means for carrying them out, moving against a country on orders and fighting a war after it has been instituted, do not constitute the planning, preparation, initiation and waging of war or the initiation of invasion that International Law denounces as criminal.

" Under the record we find the defendants were not on the policy level, and are not guilty under Count I of the Indictment. With crimes charged to have been committed by them in the *manner* in which they behaved in the waging of war, we deal in other parts of this Judgment."

(v) *Responsibility of the Wehrmacht for War Crimes*

The Tribunal pointed out that war crimes had been committed by the Wehrmacht(1) which were " deliberate, gross and continued violations of the customs and usages of war as well as of the Hague Regulations (1907) and the Geneva Convention (1929) and of the International Common Law."(2) The Tribunal also adopted a finding by the International Military Tribunal that certain stated offences committed by the German Army against civilians were violations of laws of war.(3) The Judgment then stated that, " The connection of the defendants with these offences is disposed of in our discussion of the individual cases."

(vi) *The Plea of Superior Orders*(4)

The Tribunal dealt with this plea as follows :

" Control Council Law No. 10, Art. II, Secs. 4 (a) and 4 (b), provides :

' 4 (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

(b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.'

These two paragraphs are clear and definite. They relate to the crimes defined in Control Council Law No. 10, Art. II, Secs. 1 (a), 1 (b), and 1 (c). All of the defendants in this case held official positions in the armed forces of the Third Reich. Hitler from 1938 on was Commander-in-Chief of the Armed Forces and was the Supreme Civil and Military Authority in the Third Reich, whose personal decrees had the force and effect of law. Under such circumstances to recognize as a defence to the crimes set forth in Control Council Law No. 10 that a defendant acted pursuant to the order of his government or of a superior would be in practical effect to say that all the guilt charged in the Indictment was the guilt of Hitler alone because he alone possessed the law-making power of the State and the supreme authority to issue civil and military directives. To recognize such a contention would be to recognize an absurdity.

" It is not necessary to support the provision of Control Council Law No. 10, Art. II, Secs. 4 (a) and (b), by reason, for we are bound by it as one of the basic authorities under which we function as a Judicial Tribunal. Reason is not lacking.

" Inasmuch as one of the reiterated arguments advanced is the injustice of even charging these defendants with being guilty of the crimes set forth in

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(1) See pp. 16-19.

(2) This material appears under a section headed *War Crimes and Crimes against Humanity*, but the Tribunal did not in fact deal with the law relating to crimes against humanity. In dealing with the responsibility of Warlimont, however, the Tribunal characterized as a crime against humanity, as well as a breach of the Geneva Convention, the plan of the leaders of the German Reich to inspire the German population to murder Allied airmen.

(3) See pp. 19-23.

(4) See also Vol. V of these Reports, pp. 13-22, Vol. VII, p. 65, Vol. VIII, pp. 90-2, and Vol. X, pp. 174-6.

the Indictment, when they were, it is said, merely soldiers and acted under governmental directives and superior orders which they were bound to obey, we shall briefly note what we consider sound reasons for the rejection of such a defence.

" The rejection of the defence of superior orders without its being incorporated in Control Council Law No. 10 that such defence shall not exculpate would follow of necessity from our holding that the acts set forth in Control Council Law No. 10 are criminal not because they are therein set forth as crimes but because they then were crimes under International Common Law. International Common Law must be superior to and, where it conflicts with, take precedence over National Law or directives issued by any national governmental authority. A directive to violate International Criminal Common Law is therefore void and can afford no protection to one who violates such law in reliance on such a directive.

" The purpose and effect of all law, national or international, is to restrict or channelize the action of the citizen or subject. International Law has for its purpose and effect the restricting and channelizing of the action of nations. Since nations are corporate entities, a composite of a multitude of human beings, and since a nation can plan and act only through its agents and representatives, there can be no effective restriction or channelizing of national action except through control of the agents and representatives of the nation, who form its policies and carry them out in action.

" The State being but an inanimate corporate entity or concept, it cannot as such make plans, determine policies, exercise judgment, experience fear or be restrained or deterred from action except through its animate agents and representatives. It would be an utter disregard of reality and but legal shadow-boxing to say that only the State, the inanimate entity, can have guilt, and that no guilt can be attributed to its animate agents who devise and execute its policies. Nor can it be permitted even in a dictatorship that the dictator, absolute though he may be, shall be the scapegoat on whom the sins of all his governmental and military subordinates are wished ; and that, when he is driven into a bunker and presumably destroyed, all the sins and guilt of his subordinates shall be considered to have been destroyed with him.

" The defendants in this case who received obviously criminal orders were placed in a difficult position but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defence. To establish the defence of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong. No such situation has been shown in this case.

" Furthermore, it is not a new concept that superior orders are no defence for criminal action. Article 47 of the German Military Penal Code, adopted in 1872, was as follows :

> ' If through the execution of an order pertaining to the service, a penal law is violated, then the superior giving the order is alone

responsible. However, the obeying subordinate shall be punished as accomplice (Teilnehmer):

'(1) if he went beyond the order given to him, or

'(2) if he knew that the order of the superior concerned an act which aimed at a civil or military crime or offence.'

The amendment of this in 1940 omitted the last two words "to him" in Section 1 above and in Section 2 changed the words, "civil or military crime or offence," to "general or military crime or offence." If this amendment had any effect, it extended rather than restricted the scope of the preceding act.

"It is interesting to note that an article by Goebbels, the Reich Propaganda Minister, which appeared in the *Voelkischer Beobachter*, the official Nazi publication, on 28th May, 1944, contained the following correct statement of the law:

'It is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior, especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare.'"

Turning to the specific problem of responsibility for *passing on* illegal orders, the Tribunal said:

"It is urged that a commander becomes responsible for the transmittal in any manner whatsoever of a criminal order. Such a conclusion this Tribunal considers too far reaching. The transmittal through the chain of command constitutes an implementation of an order. Such orders carry the authoritative weight of the superior who issues them and of the subordinate commanders who pass them on for compliance. The mere intermediate administrative function of transmitting an order directed by a superior authority to subordinate units, however, is not considered to amount to such implementation by the commander through whose headquarters such orders pass. Such transmittal is a routine function which in many instances would be handled by the staff of the commander without being called to his attention. The commander is not in a position to screen orders to transmitted. His headquarters, as an implementing agency, has been by-passed by the superior command.

"Furthermore, a distinction must be drawn as to the nature of a criminal order itself. Orders are the basis upon which any army operates. It is basic to the discipline of an army that orders are issued to be carried out. Its discipline is built upon this principle. Without it, no army can be effective and it is certainly not incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality. Within certain limitations, he has the right to assume that the orders of his superiors and the State which he serves and which are issued to him are in conformity with International Law.

"Many of the defendants here were field commanders and were charged with heavy responsibilities in active combat. Their legal facilities were limited. They were soldiers—not lawyers. Military commanders in the

field with far reaching military responsibilities cannot be charged under International Law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under International Law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.

"It is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal."(1)

(vii) *Responsibility of a Commanding Officer for Acts not Ordered by Him*

The Tribunal continued :

"While, as stated, a commanding officer can be criminally responsible for implementing an illegal order of his superiors, the question arises as to whether or not he becomes responsible for actions committed within his command pursuant to criminal orders passed down independent of him. The choices which he has for opposition in this case are few : (1) he can issue an order countermanding the order ; (2) he can resign ; (3) he can sabotage the enforcement of the order within a somewhat limited sphere.

"As to countermanding the order of his superiors, he has no legal status or power. A countermanding order would not only subject him to the severest punishment, but would be utterly futile and in Germany, it would undoubtedly have focused the eyes of Hitler on its rigorous enforcement.

"His second choice—resignation—was not much better. Resignation in war-time is not a privilege generally accorded to officers in an army. This is true in the army of the United States. Disagreement with a State policy as expressed by an order affords slight grounds for resignation. In Germany, under Hitler, to assert such a ground for resignation probably would have entailed the most serious consequences for an officer.

"Another field of opposition was to sabotage the order. This he could do only verbally by personal contacts. Such verbal repudiation could never be of sufficient scope to annul its enforcement.

"A fourth decision he could make was to do nothing.

"Control Council Law No. 10, Article 2, paragraph 2, provides in pertinent part as follows :

> 'Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this article, if he. . . (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) *took a consenting part therein*, or (d) *was connected with* plans or enterprises involving its commission. . . .' (emphasis supplied).

(1) This is the test applied as a rule to the plea of superior orders in general ; see Vol. V, pp. 19-22.

"As heretofore stated,[1] his "connection" is construed as requiring a personal breach of a moral obligation. Viewed from an international standpoint, such has been the interpretation of preceding Tribunals. This connection may however be negative. Under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal, violates a moral obligation under International Law. By doing nothing he cannot wash his hands of international responsibility. His only defence lies in the fact that the order was from a superior which Control Council Law No. 10 declares constitutes only a mitigating circumstance."

At a later point in its Judgment, the Tribunal returned to the question of the responsibility of commanders of occupied territories for offences other than those ordered by them :

"The defence in this case as to the field commanders on trial has been partially based on the contention that while criminal acts may have occurred within the territories under their jurisdiction, that these criminal acts were committed by agencies of the State with which they were not connected and over whom they exercised no supervision or control. It is conceded that many of these defendants were endowed with executive power but it is asserted that the executive power of field commanders did not extend to the activities of certain economic and police agencies which operated within their areas ; that the activities of these agencies constituted limitations upon their exercise of executive power.

"In this connection it must be recognized that the responsibility of commanders of occupied territories is not unlimited. It is fixed according to the customs of war, international agreements, fundamental principles of humanity, and the authority of the commander which has been delegated to him by his own government. As pointed out heretofore, his criminal responsibility is personal. The act or neglect to act must be voluntary and criminal. The term "voluntary" does not exclude pressures or compulsions even to the extent of superior orders. That the choice was a difficult one does not alter either its voluntary nature of its criminality. From an international standpoint, criminality may arise by reason that the act is forbidden by international agreements or is inherently criminal and contrary to accepted principles of humanity as recognized and accepted by civilized nations. In the case of violations of international agreements, the criminality arises from violation of the agreement itself—in other cases, by the inherent nature of the act.

"War is human violence at its utmost. Under its impact, excesses of individuals are not unknown in any army. The measure of such individual excesses is the measure of the people who compose the army and the standard of discipline of the army to which they belong. The German Army was, in general, a disciplined army. The tragedy of the German Wehrmacht and these defendants is that the crimes charged against them stem primarily

(1) The Tribunal had ruled that: "For a defendant to be held criminally responsible, there must be a breach of some moral obligation fixed by international law, a personal act voluntarily done with knowledge of its inherent criminality under international law."

from its highest military leadership and the leadership of the Third Reich itself.

" Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means co-extensive. Modern war such as the last war, entails a large measure of de-centralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of International Law would go far beyond the basic principles of criminal law as known to civilized nations.

" Concerning the responsibility of a field commander for crimes committed within the area of his command, particularly as against the civilian population, it is urged by the prosecution that under the Hague Convention, a military commander of an occupied territory is *per se* responsible within the area of his occupation, regardless of orders, regulations, and the laws of his superiors limiting his authority and regardless of the fact that the crimes committed therein were due to the action of the State or superior military authorities which he did not initiate or in which he did not participate. In this respect, however, it must be borne in mind that a military commander, whether it be of an occupied territory or otherwise, is subject both to the orders of his military superiors and the State itself as to his jurisdiction and functions. He is their agent and instrument for certain purposes in a position from which they can remove him at will.

" In this connection the Yamashita case(1) has been cited. While not a decision binding upon this Tribunal, it is entitled to great respect because of the high court which rendered it. It is not, however, entirely applicable to the facts in this case for the reason that the authority of Yamashita in the field of his operations did not appear to have been restricted by either his military superiors or the State, and the crimes committed were by troops under his command, whereas in the case of the occupational commanders in these proceedings, the crimes charged were mainly committed at the instance of higher military and Reich authorities.

" It is the opinion of this Tribunal that a State can, as to certain matters, under International Law, limit the exercise of sovereign powers by a military commander in an occupied area, but we are also of the opinion that under

(1) See Vol. IV of these Reports, pp. 1-96.

International Law and accepted usages of civilized nations, that he has certain responsibilities which he cannot set aside or ignore by reason of activities of his own State within his area. He is the instrument by which the occupancy exists. It is his army which holds the area in subjection. It is his might which keeps an occupied territory from reoccupancy by the armies of the nation to which it inherently belongs. It cannot be said that he exercises the power by which a civilian population is subject to his invading army while at the same time the State which he represents may come into the area which he holds and subject the population to murder of its citizens and to other inhuman treatment. The situation is somewhat analogous to the accepted principle of International Law that the army which captures the soldiers of its adversary has certain fixed responsibilities as to their care and treatment.

" We are of the opinion, however, as above pointed out in other aspects of this case, that the occupying commander must have knowledge of these offences and acquiesce or participate or criminally neglect to interfere in their commission and that the offences committed must be patently criminal. But regardless of whether or not under International Law such responsibility is fixed upon him, under the particular facts in this case, responsibility of the commanders in question rests upon other factors. In this respect we quote certain provisions of the Handbook for the General Staff in War Time, pertinent to executive power :

'(5) The exercising of executive power by military commanders is governed by No. 20-24 of Army Reg. 90 (of the Army in the Field).

'(6) If a Zone of Operation is determined, the Commander-in-Chief of the Army and the Commanders-in-Chief of the Armies receive at the declaration of a state of defence or at the declaration of a state of war, authority for exercising executive power in this territory, without further order (paragraphs 2 and 9 of the Reich Defence Law).

'In other cases, the Fuehrer and Supreme Commander of the Wehrmacht can transfer such authority for exercising executive power to the Commander-in-Chief of the Army and the Commanders-in-Chief of the Armies.

'(7) The executive power comprises the entire State power including the right of issuing laws without prejudice to the independence of jurisdiction. Those persons invested with executive power can decree local orders affecting the territory in which authority for exercising has been turned over to them or transferred to them, set up special courts, and issue instructions to the authorities and offices competent in the territory named, with the exception of the Supreme Reich Authorities, the Supreme Prussian Provincial Authorities, and the Reichleitung of the NSDAP.

'(8) The Supreme Reich Authorities, Supreme Prussian Provincial Authorities, and the Reichleitung of the NSDAP can decree orders for the territory into which executive power has been transferred, only by agreement with the persons invested with executive power. Their right of issuing instructions to the authorities and offices subordinated to them remains intact. Nevertheless, the right of

issuing instruction by the person invested with executive authority takes precedence.

' (9) Authority for exercising executive power is incumbent only on the persons invested. It can be transferred further only inasmuch as an authorization is ordered thereto actually or legally.

' Accordingly, persons invested with executive power are authorized to entrust subordinated offices with the execution of individual missions.

' (10) The laws, decrees, etc., which are valid at the transfer of the executive Power retain their validity so long as the person invested with executive power encounters no contrary order.

' (11) The Commander-in-Chief of the Army regulates the exercising of executive power through the Commanders-in-Chief of the Armies.

' The revision of questions which occur in the exercising of executive power does not fall into the realm of work of the Army judges. The civilian commissioner with the High Command of the Army is assigned for that purpose to the Commander-in-Chief of the Army ; the chiefs of the civil administration, to the Commanders-in-Chief of the Armies. Persons invested with executive power are authorized, however, to call in the Army judges assigned to them as counsellors, especially in the decreeing of legal orders of penal law content.'

" It is therefore apparent that executive power under German law is the exercise of sovereign powers within an occupied area conferred upon a military commander by the State. The defence has undertaken to minimize to a large extent this wide authority, but in view of the above document, it does not appear to be the mere shadow of authority contended. In fact, these provisions fix upon an occupying commander certain responsibilities as to the preservation of law and order within his area.

" The contention of defendants that the economic agencies were excluded from their exercise of executive power is disproved by various documents which will hereafter be cited in considering the guilt or innocence of defendants on trial. And regardless of that fact, the proof in this case also establishes a voluntary co-operation of defendants on trial with these economic agencies in the futherance of their illegal activities.

" The defence contends that the activities of the Einsatzgruppen of the Security Police and SD were beyond their sphere of authority as occupational commanders, because the State had authorized the illegal activities of these police units and so limited the executive power of the occupational commanders. However, the occupational commanders in this case were bearers of executive power and, one and all, have denied receipt of any orders showing, or knowledge of, a State authorized programme providing for the illegal activities of the Einsatzgruppen.

" One of the functions of an occupational commander endowed with executive power, was to maintain order and protect the civilian population against illegal acts. In the absence of any official directives limiting his executive powers as to these illegal acts within his area, he had the right and duty to take action for their suppression. Certainly he is not in a position

to contend that these activities were taken from his field of executive power by his superiors when he knew of no such action on their part.

" The sole question then as to such defendants in this case is whether or not they knew of the criminal activities of the Einsatzgruppen of the Security Police and SD and neglected to suppress them.

" It has been urged that all of the defendants in this case must have had knowledge of the illegal activities of the Einsatzgruppen. It has been argued that because of the extent of their murder programme in the occupational areas and by reason of the communications available to the high commanders, and the fact that they were in command of these areas, they must necessarily have known of this programme. . . .

" It is true that extermination of such a large number of people must necessarily have come to the attention of many individuals, and also, it is established that soldiers in certain areas participated in some of these executions.

" In many respects a high commander in the German Army was removed from information as to facts which may have been known to troops subordinate to him. In the first place, these troops were in many instances far removed from his headquarters. In addition, the common soldiers and junior officers do not have extensive contacts with the high commanders and staff officers.

" Another factor must also be taken into consideration in connection with the activities of the Einsatzgruppen. This is the dual nature of its functions. On the one hand, it was charged with the criminal liquidation of certain elements ; on the other hand, it exercised legitimate police activities in connection with the security of the rear communications of the armies, in which capacity it operated largely against guerillas.

" Another factor was the effort made to keep the criminal activities of these police units from the Wehrmacht."

After some further discussion of the reasons why the accused did not know the full extent of the activities of the Einsatzgruppen, the Tribunal concluded :

" Other factors to be considered as to the knowledge of criminal acts of the SIPO and SD by defendants is the time, the localities, the combat situation, the extent of the activities, and the nature of the command.

" This, in brief, summarizes the main factor considered and the sources of knowledge appraised in determining the criminal responsibility of the defendants in this case in connection with activities of the Einsatzgruppen of the SIPO and SD. From this discussion it is apparent we can draw no general presumption as to their knowledge in this matter and must necessarily go to the evidence pertaining to the various defendants to make a determination of this question.

" And it is further pointed out that to establish the guilt of a defendant from connection with acts of the SIPO and SD by acquiescence, not only

must knowledge be established, but the time of such knowledge must be established."

(viii) *The Responsibility of Staff Officers*

The Tribunal said:

"There has also been much evidence and discussion in this case concerning the duties and responsibilities of staff officers in connection with the preparation and transmittal of illegal orders. In regard to the responsibility of the Chief-of-Staff of a field command, the finding of Tribunal V in Case No. 7 as to certain defendants has been brought to the attention of the Tribunal.(1) It is pointed out that the decision as to Chiefs of Staff in that case was a factual determination and constitutes a legal determination only insofar as it pertains to the particular facts therein involved. We adopt as sound law the finding therein made, but we do not give that finding the scope that is urged by defence counsel in this case to the effect that all criminal acts within a command are the sole responsibility of the commanding general, and that his Chief-of-Staff is absolved from all criminal responsibility merely by reason of the fact that his commanding general may be charged with responsibility therefore. It is further pointed out that the facts in that case are not applicable to any defendant on trial in this case.

"The testimony of various defendants in this case as to the functions of staff officers and chiefs of staff has not been entirely consistent. Commanding generals on trial have pointed out that there were certain functions which they necessarily left to the chiefs of staff, and that at times they did not know of orders which might be issued under authority of their command. Staff officers on trial have urged that a commanding officer was solely responsible for what was done in his name. Both contentions are subject to some scrutiny.

"In regard to the functions of staff officers in general as derived from various documents and the testimony of witnesses, it is established that the duties and functions of such officers in the German Army did not differ widely from the duties and functions in other armies of the world. Ideas and general directives must be translated into properly prepared orders if they are to become effective in a military organization. To prepare orders is the function of staff officers. Staff officers are an indispensable link in the chain of their final execution. If the basic idea is criminal under International Law, the staff officer who puts that idea into the form of a military order, either himself or through subordinates under him, or takes personal action to see that it is properly distributed to these units where it becomes effective, commits a criminal act under International Law.

"Staff officers, except in limited fields, are not endowed with command authority. Subordinate staff officers normally function through the chiefs of staff. The chief of staff in any command is the closest officer, officially at least, to the commanding officer. It is his function to see that the wishes of his commanding officer are carried out. It is his duty to keep his commanding officer informed of the activities which take place within the field of his command. It is his function to see that the commanding officer is

(1) See Vol. VIII, pp. 34-92, and particularly pp. 89-90.

relieved of certain details and routine matters, that a policy having been announced, the methods and procedures for carrying out such policy are properly executed. His sphere and personal activities vary according to the nature and interests of his commanding officer and increase in scope dependent upon the position and responsibilities of such commander.

" Since a chief of staff does not have command authority in the chain of command, an order over his own signature does not have authority for subordinates in the chain of command. As shown by the record in this case, however, he signs orders for and by order of his commanding officer. In practice, a commanding officer may or may not have seen these orders. However, they are presumed to express the wishes of the commanding officer. While the commanding officer may not and frequently does not see these orders, in the normal process of command, he is informed of them and they are presumed to represent his will unless repudiated by him. A failure to properly exercise command authority is not the responsibility of a chief of staff.

" In the absence of participation in criminal orders or their execution within a command, a chief of staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units. All he can do in such cases is call these matters to the attention of his commanding general. Command authority and responsibility for its exercise rest definitely upon his commander.

" Under normal military procedure, a commanding officer signs communications to higher commanders. He also in certain cases signs orders to subordinates which are considered to establish basic policy or whose importance he wishes to emphasize ; but the majority of orders issued in a command, as shown by the record, are issued 'for' or 'by order' and signed only by the chief of staff. All such orders are binding on subordinates. How far a chief of staff can go in issuing orders without previous authorization or without calling them to the attention of his commander depends upon many factors, including his own qualifications, his rank, the nature of the headquarters, his personal relationship with his commander, and primarily upon the personality of the commander. A chief of staff does not hold a clerical position. In the German Army, chiefs of staff were not used below an army corps. The rank and care with which staff officers were selected, show in itself the wide scope of their responsibilities which could, and in many instances undoubtedly did, result in the chief of staff assuming many command and executive responsibilities which he exercised in the name of his commander.

" One of his main duties was to relieve his commander of certain responsibilities so that such commander could confine himself to those matters considered by him of major importance. It was of course the duty of a chief of staff to keep such commander informed of the activities which took place within the field of his command insofar at least as they were considered of sufficient importance by such commander. Another well accepted function of chiefs of staff and of all staff officers is, within the field of their activities, to prepare orders and directives which they consider necessary and appropriate in that field and which are submitted to their superiors for approval.

"As stated heretofore, the responsibility allowed a chief of staff to issue orders and directives in the name of his commander varied widely and his independent powers for exercising initiative therefore also varied widely in practice. The field for personal initiative as to other staff officers also varied widely. That such a field did exist, however, is apparent from the testimony of the various defendants who held staff positions and in their testimony have pointed out various cases in which they modified the specific desires of their superiors in the interests of legality and humanity. If they were able to do this, the same power could be exercised for other ends and purposes and they were not mere transcribers of orders.

"Surely the staff officers of the OKW did not hold their high ranks and positions and did not bask in the bright sunlight of official favour of the Third and Thousand Year Reich by merely impeding and annulling the wishes of the Nazi masters whom they served.

"It over-taxes the credulity of this Tribunal to believe that Hitler or Keitel or Jodl, or all three of these dead men, in addition to their many activities as to both military matters and matters of State, were responsible for the details of so many orders, words spoken in conferences, and even speeches which were made. We are aware that many of the evil and inhumane acts of the last war may have originated in the minds of these men. But it is equally true that the evil they originated and sponsored did not spread to the far-flung troops of the Wehrmacht of itself. Staff officers were indispensable to that end and cannot escape criminal responsibility for their essential contribution to the final execution of such orders on the plea that they were complying with the orders of a superior who was more criminal."

(ix) *The Criminality of Certain Orders*

The Tribunal specifically declared to be criminal certain orders, particularly the following: the Commissar Order, with supplements,(1) the Barbarossa Jurisdiction Order,(2) the Commando Order,(3) and the Night and Fog Decree.(4)

Speaking of that part of the Barbarossa order which dispensed with court-martial jurisdiction over the civilian population of occupied territory,(5) the Tribunal said: "court-martial jurisdiction of civilians is not considered under International Law an inherent right of a civilian population and is not an inherent prerogative of a military commander. The obligation towards civilian populations concerns their fair treatment. Court-martial jurisdiction of a military commander and its extent are determined by his superiors. It has been urged in this trial that there is no rule of International Law that guerillas be brought to trial before a court and that this order authorizing their disposition on the arbitrary decision of an officer is therefore not illegal. There may be some doubt that trial before a court is in fact required under International Law.

(1) See p. 23.
(2) See p. 29.
(3) See p. 34.
(4) See p. 37. The Tribunal also specifically declared criminal the order whose text appears on p. 38.
(5) See p. 30.

"But in considering this order, it must be borne in mind that it was not solely applicable to guerrillas, and that it is an obligation upon an occupying force to provide for the fair treatment of the civilians within the occupied area.(1) Whatever may be said as to the summary proceedings against guerrillas, the allowing of such summary proceedings in the discretion of a junior officer, in the case of the wide variety of offences that were left open to him, is considered criminal.

"Furthermore, the fourth paragraph of Section I above, in its most favourable construction is at best ambiguous, but the logical inference to be drawn from this section goes further in the opinion of the Tribunal and provides that suspected *franc-tireurs* may be shot, which is also considered illegal.

"The fourth paragraph of Section I also provides for collective coercive measures to be applied immediately upon the order of an officer of at 'least a battalion, etc., commander,' and is considered illegal in that it places no limitations upon such collective actions whatsoever.

"For these reasons the first part of this order is considered illegal and we so find."

The Tribunal then continued:

"With regard to the second aspect of this order, that is the obligation to prosecute soldiers who commit offences against the indigenous population, this obligation as a matter of International Law is considered doubtful. The duty imposed upon a military commander is the protection of the civilian population. Whether this protection be assured by the prosecution of soldiers charged with offences against the civilian population, or whether it be assured by disciplinary measures or otherwise, is immaterial from an international standpoint. This order in this respect . . . was subject to the interpretation that unwarranted acts against civilians constituted a breach of discipline. The illegal application of the order, therefore, rested to a marked extent with the commanders in the field." Moreover, section 6 of paragraph I of the order "left the door open for commanders-in-chiefs of army groups opposed to the arbitrary provisions of the order as to civilians, to take action to eliminate it from their areas. This the record shows none of them did."

The Tribunal completed its treatment of the Barbarossa Jurisdiction Order with the following words:

"This Tribunal does not hold field commanders guilty for a failure to properly appraise the fine distinctions of International Law, nor for failure to execute court-martial jurisdiction which had been taken away from them, but it does consider them criminally responsible for the transmission of an order that could, and from its terms would, be illegally applied where they have transmitted such an order without proper safeguards as to its application. For that failure on their part they must accept criminal

(1) On the other hand it could be argued that since guerrillas also are inhabitants of occupied territories they are entitled to a fair trial; in fact the weight of judicial authority has been in favour of requiring that all alleged war criminals or war traitors be granted a fair trial before execution. Regarding this question, and for the elements of the right to a fair trial, see Vol. V, pp. 70-81, and Vol. VI, pp. 96-104.

responsibility for its misapplication within subordinate units to which they transmitted it. And in view of the relation of this order to *franc-tireurs*, it takes the view that while commanding generals might not be able under the provisions of the Barbarossa Jurisdiction Order to establish courts-martial to try them, such commanders were nevertheless responsible, within the areas of their commands, for the summary execution of persons who were merely suspects(1) or those who, from their acts, were not in fact *franc-tireurs* at all, such as the execution of the nineteen-year-old girl who wrote a song derogatory of the German invader of her country."

On the other hand, the Judgment contains the following passage in the course of the treatment of the responsibility of von Leeb :

" Leningrad was encircled and besieged. Its defenders and the civilian population were in great straits and it was feared the population would undertake to flee through the German lines. Orders were issued to use artillery to ' prevent any such attempt at the greatest possible distance from our own lines by opening fire as early as possible, so that the infantry, if possible, is spared shooting on civilians.' We find this was known to and approved by von Leeb. Was it an unlawful order ?

> " ' A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavour by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence the cutting off of every source of sustenance from without is deemed legitimate. It is said that if the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender.' (Hyde, Vol. 3, Sec. 656, pp. 1802-1803.)

" We might wish the law were otherwise, but we must administer it as we find it. Consequently, we hold no criminality attaches on this charge."

(x) *Hostages and Reprisals*

As to this point, the Judgment states :

" In the Southeast Case, United States *v.* Wilhelm List, *et al.* (Case No. 7),(2) the Tribunal had occasion to consider at considerable length the law relating to hostages and reprisals. It was therein held that under certain very restrictive conditions and subject to certain rather extensive safeguards, hostages may be taken, and after a judicial finding of strict compliance with all pre-conditions, and as a last desperate remedy, hostages may even be sentenced to death. It was held further that similar drastic safeguards, restrictions, and judicial pre-conditions apply to so-called ' reprisal prisoners.' If so inhumane a measure as the killing of innocent persons for offences of others, even when drastically safeguarded and limited, is ever permissible under any theory of International Law, killing without full compliance with all requirements would be murder.

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(1) From this statement it seems that, when stating that " there may be some doubt that trial before a court is in fact required under international law," the Tribunal was speaking of some category other than " those who were merely suspects." (See p. 83 and footnote (1) thereto.)

(2) See Vol. VIII, pp. 34-92.

If killing is not permissible under any circumstances, than a killing with full compliance with all the mentioned prerequisites still would be murder.

" In the case here presented, we find it unnecessary to approve or disapprove the conclusions of law announced in said Judgment as to the permissibility of such killings. In the instances of so-called hostage taking and killing, and the so-called reprisal killings with which we have to deal in this case, the safeguards and pre-conditions required to be observed by the Southeast Judgment were not even attempted to be met, or even suggested as necessary. Killings without full compliance with such pre-conditions are merely terror murders. If the law is in fact that hostage and reprisal killings are never permissible at all, then also the so-called hostage and reprisal killings in this case are merely terror murders."

(xi) *Partisan Warfare*

On this point the Judgment begins :

" The execution of partisans as *franc-tireurs* is connected with the Barbarossa Jurisdiction Decree in that it involves the treatment of civilians by the occupying and invading forces.

" The record in this case contains much testimony, and among the numerous exhibits are many documents dealing with so-called partisan warfare. We deem it desirable to make some comment on the law relating thereto before considering the cases of the individual defendants.

" Articles 1 and 2 of the Annex to the Hague Convention are as follows :

' Article 1

' The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions :

' (1) To be commanded by a person responsible for his subordinates;

' (2) To have a fixed distinctive emblem recognizable at a distance ;

' (3) To carry arms openly ; and

' (4) To conduct their operations in accordance with the laws and customs of war.

' In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination " army."

' Article 2

' The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.'

" A failure to meet these requirements deprives one so failing on capture of a prisoner-of-war status.

" We have a strong suspicion from the record in this case that anti-partisan warfare was used by the German Reich as a pretext for the extermination of many thousands of innocent persons.

The Tribunal ruled that an order reading: " Every civilian who impedes or incites others to impede the German Wehrmacht is also to be considered a guerrilla (for instance: instigators, persons who distribute leaflets, non-observance of German orders, arsonists, destroying of road signs, supplies, etc.)," clearly opened the way for " arbitrary and blood implementation." The Judgment continued: " Those falling into the various classifications were summarily executed as partisans, and so classified in the reports. There is no warrant in the Rules of War or in International Law for dealing with such persons as *franc-tireurs*, guerillas, or bandits. Red Army soldiers in uniform were in some instances shot as so-called partisans. There is, of course, no warrant in International Law for such action."

The Tribunal pointed out that the executions of " 'partisan suspects' were a regular routine, and their executions were reported along with those of the so-called partisans." It expressed the following view on such executions:

" Suspicion is a state of mind of the accuser and not a state of mind or an act by the one accused. It is a monstrous proposition containing the very essence of license that the state of mind of the accuser shall be the determining factor, in the absence of evidence of guilt, whether the accused shall or shall not be summarily executed. But it is said that when those accused were captured they were interrogated and some were not executed, but released or sent to prison camps. But this is no defence, for it does not necessarily mean that those who were executed as suspects had been found guilty even by the informal interrogation by an officer, but only that the interrogator *had not had his suspicion that they were guilty removed*, so, under the order, they, being still suspected, were executed. This does not amount to even the minimum of judicial protection required before an execution.

" The classification of the victims in the numerous reports in the record as partisan suspects is a natural and proper one to be made under the order for execution on mere suspicion of partisan activity. If, as defendants have contended, no suspects were executed until they were lawfully found and adjudged to be guilty, there was no need whatsoever for the distinction made in the classification. We find from the evidence that there were great numbers of persons executed in the areas of various of these defendants, who, under no stretch of the imagination were *franc-tireurs*, and great numbers of others executed solely on suspicion, without any proof or lawful determination that they were in fact guilty of the offences of which they were suspected. The orders to execute such persons and mere suspects on suspicion only and without proof, were criminal on their face. Executions pursuant thereto were criminal. Those who gave or passed down such orders must bear criminal responsibility for passing them down and for their implementation by the units subordinate to them."

(xii) *The Interpretation and Applicability of the Hague and Geneva Conventions*

The Tribunal pointed out that: " Another question of general interest in this case concerns the applicability of the Hague Convention and the Geneva Convention as between Germany and Russia." The Judgment continues: " In determining the applicability of the Hague Convention, it must be borne in mind, first, that Russia ratified this Convention, but

Bulgaria and Italy did not. The binding effect of the Hague Convention upon Germany was considered by the IMT in the trial against Goering, *et al.* On page 253 of that Judgment, it is stated :

> ' But it is argued that the Hague Convention does not apply in this case, because of the " general participation " clause in Article 2 of the Hague Convention of 1907. That clause provided :
>
> > ' The provisions contained in the regulations (Rules of Land Warfare) referred to in Article I as well as in the present Convention, do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.'
>
> ' Several of the belligerents in the recent war were not parties to this Convention.
>
> ' In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing International Law at the time of their adoption. But the Convention expressly stated that it was an attempt " to revise the general laws and customs of war," which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter.'

" It is apparent from the above quotation that the view adopted by the IMT in that case as to the Hague Conventions was that they were declaratory of existing International Law, and therefore binding upon Germany. In this connection it is further pointed out that the defence in this case, particularly as regards partisan warfare, primarily is based upon the fact that partisans could be shot or hanged since under the Hague Convention they were not lawful belligerents. The defence can hardly contend that Germany was in a position to sort out as binding on her only those provisions of these Conventions which suited her own purposes. Like the IMT, we do not feel called upon in this case to determine whether or not the Hague Conventions were binding upon Germany as an international agreement. We adopt the principle outlined in that case to the effect that in substance these provisions were binding as declaratory of International Law."

Of the applicability of the Geneva Convention, the Tribunal said that: " It is to be borne in mind that Russia was not a signatory Power to this Convention. There is evidence in this case derived from a divisional order of a German division that Russia had signified her intention to be so bound. However, there is no authoritative document in this record upon which to base such a conclusion. In the case of Goering, *et al.*, above cited, the IMT, on page 232, stated as follows :

> ' The argument in defence of the charge with regard to the murder and ill-treatment of Soviet prisoners of war, that the U.S.S.R. was not a party to the Geneva Convention, is quite without foundation. On 15th September, 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, signed by General Reinecke on 8th September, 1941. He then stated :

"The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the U.S.S.R. Therefore only the principles of general International Law on the treatment of prisoners of war apply. Since the eighteenth century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people . . . The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint."

'Article 6 (b) of the Charter provides that "ill-treatment . . . of civilian population of or in occupied territory . . . killing of hostages . . . wanton destruction of cities, towns, or villages" shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46, which stated : "Family honour and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected."'

"It would appear from the above quotation that that Tribunal accepted as International Law the statement of Admiral Canaris to the effect that the Geneva Convention was not binding as between Germany and Russia as a contractual agreement, but that the general principles of International Law as outlined in those Conventions were applicable. In other words, it would appear that the IMT in the case above cited, followed the same lines of thought with regard to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in substance an expression of International Law as accepted by the civilized nations of the world, and this Tribunal adopts this viewpoint."

The Tribunal next dealt with two points of interpretation as follows :

"One serious question that confronts us arises as to the use of prisoners of war for the construction of fortifications. It is pointed out that the Hague Convention specifically prohibited the use of prisoners of war for any work in connection with the operations of war, whereas the later Geneva Conventions provided that there shall be no *direct* connection with the operations of war. This situation is further complicated by the fact that when the proposal was made to definitely specify the exclusion of the building of fortifications, objection was made before the conference to that limitation, and such definite exclusion of the use of prisoners, was not adopted. It is no defence in the view of this Tribunal to assert that international crimes were committed by an adversary, but as evidence given to the interpretation of what constituted accepted use of prisoners of war under International Law, such evidence is pertinent. At any rate, it appears that the illegality of such use was by no means clear. The use of prisoners of war in the construction of fortifications is a charge directed against the field commanders on trial here. This Tribunal is of the opinion that in view of the uncertainty of International Law as to this matter, orders providing for such use from superior authorities, not involving the use of prisoners of war

in dangerous areas, were not criminal upon their face, but a matter which a field commander had the right to assume was properly determined by the legal authorities upon higher levels.

" Another charge against the field commanders in this case is that of sending prisoners of war to the Reich for use in the armament industry. The term ' for the armament industry ' appears in numerous documents. While there is some question as to the interpretation of this term, it would appear that it was used to cover the manufacture of arms and munitions. It was nevertheless legal for field commanders to transfer prisoners of war to the Reich and thereafter their control of such prisoners terminated. Communications and orders specifying that their use was desired by the armament industry, or that prisoners were transmitted for the armament industry are not in fact binding as to their ultimate use. Their use subsequent to transfer was a matter over which the field commander had no control. Russian prisoners of war were in fact used for many purposes outside the armament industry. Mere statements of this kind cannot be said to furnish irrefutable proof against the defendants for the illegal use of prisoners of war whom they transferred. In any event, if a defendant is to be held accountable for transmitting prisoners of war to the armament industry, the evidence would have to establish that prisoners of war shipped from his area were in fact so used.

" Therefore, as to the field commanders in this case, it is our opinion that, upon the evidence, responsibility cannot be fixed upon the field commanders on trial before us for the use of prisoners of war in the armament industry."

The Tribunal then returned to the question of the declaratory character of the Hague and Geneva Conventions :

" In stating that the Hague and Geneva Conventions express accepted usages and customs of war, it must be noted that certain detailed provisions pertaining to the care and treatment of prisoners of war can hardly be so designated. Such details it is believed could be binding only by international agreement. But since the violation of these provisions is not in issue in this case, we make no comment thereon, other than to state that this judgment is in no way based on the violation of such provisions as to Russian prisoners of war.

" Most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia. These concern (1) the treatment of prisoners of war ; (2) the treatment of civilians within occupied territories and spoliation and devastation of property therein ; and (3) the treatment of Red Army soldiers who, under the Hague Convention, were lawful belligerents.

" We cite in this category the following rules from the Hague Rules of Land Warfare :

" Article 4 :

' Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

' They must be humanely treated . . . '

" That part of Article 6 which provides :

' . . . The tasks shall not be excessive . . . '

" That part of Article 8 which provides :

' . . . Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

' Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.'

" From the Geneva Convention :

" That part of Article 2 which provides :

'. . . They must at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity . . .'

" That part of Article 3 which provides :

' Prisoners of war have the right to have their person and their honour respected. Women shall be treated with all the regard due to their sex . . .'

" Article 4, which provides :

' The power detaining prisoners of war is bound to provide for their maintenance.

' Difference in treatment among prisoners is lawful only when it is based on the military rank, state of physical or mental health, professional qualifications, or sex of those who profit thereby.'

" That part of Article 7 which provides :

' Prisoners of war shall be evacuated within the shortest possible period after their capture, to depots located in a region far enough from the zone of combat for them to be out of danger . . .'

" Those parts of Article 9 which provide that :

'. . . Prisoners captured in unhealthful regions or where the climate is injurious for persons coming from temperate regions, shall be transported, as soon as possible, to a more favourable climate ' ;

and that :

'. . . No prisoner may, at any time, be sent into a region where he might be exposed to the fire of the combat zone, nor used to give protection from bombardment to certain points or certain regions by his presence.'

" That part of Article 10 which provides :

' Prisoners of war shall be lodged in buildings or in barracks affording all possible guarantees of hygiene and healthfulness . . .'

" Those parts of Article 11 which provide :

' The food ration of prisoners of war shall be equal in quantity and quality to that of troops at base camps . . .'

and that :

'. . . A sufficiency of potable water shall be furnished them . . .'

" That part of Article 12 which provides that :

' Clothing, linen, and footwear shall be furnished prisoners of war by the detaining Power . . .'

" That part of Article 13 which provides :

' Belligerents shall be bound to take all sanitary measures necessary to assure the cleanliness and healthfulness of camps and to prevent epidemics . . .'

" Article 25 :

' Unless the conduct of military operations so requires, sick and wounded prisoners of war shall not be transferred as long as their recovery might be endangered by the trip.'

" Article 29 :

' No prisoner of war may be employed at labours for which he is physically unfit.'

" That part of Article 32 which provides :

' It is forbidden to use prisoners of war at unhealthful or dangerous work . . .'

" That part of Article 46 which provides :

'. . . Any corporal punishment, any imprisonment in quarters without daylight and, in general, any form of cruelty, is forbidden . . .'

" Article 50, which provides :

' Escaped prisoners of war who are retaken before being able to rejoin their own army or to leave the territory occupied by the army which captured them shall be liable only to disciplinary punishment.

' Prisoners who, after having succeeded in rejoining their army or in leaving the territory occupied by the army which captured them, may again be taken prisoners shall not be liable to any punishment on account of their previous flight.'

" That part of Article 56 which provides :

' In no case may prisoners of war be transferred to penitentiary establishments (prison, penitentiaries, convict prisons, etc.) there to undergo disciplinary punishment . . .'

" Under these provisions certain accepted principles of International Law are clearly stated. Among those applicable in this case are noted those provisions concerning the proper care and maintenance of prisoners of war. Also the provisions prohibiting their use in dangerous localities and employment, and in this connection it should be pointed out that we consider their

use by combat troops in combat areas for the construction of field fortifications and otherwise to constitute dangerous employment under the conditions of modern war. Under those provisions it is also apparent that the execution of prisoners of war for attempts to escape was illegal and criminal.

" Also, it is the opinion of this Tribunal that orders which provided for the turning over of prisoners of war to the SD, a civilian organization, wherein all accountability for them is shown by the evidence to have been lost, constituted a criminal act, particularly when from the surrounding circumstances and published orders, it must have been suspected or known that the ultimate fate of such prisoners of war was elimination by this murderous organization."

The Judgment contains the following paragraphs concerning the compulsory use of civilian labour :

" Concerning the compulsory use of the civilian population, spoliation, and devastation within occupied areas, the following provisions of the Hague Convention are likewise cited as applicable in this case :

' *Article* 43 :

' The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

' *Article* 46 :

' Family honour and rights, to lives of persons, and private property, as well as religious convictions and practice, must be respected.

' *Article* 47 :

' Pillage is formally forbidden.

' *Article* 49 :

' If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

' *Article* 50 :

' No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.'

" That part of Article 52 which reads as follows :

' Requisitions in kind and service shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country . . .'

" That part of Article 53 which reads as follows :

> ' An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations . . .'

" Under the Articles above quoted, it is apparent that the compulsory labour of the civilian population for the purpose of carrying out military operations against their own country was illegal.

" Under the same Articles, the compulsory recruitment from the population of an occupied country for labour in the Reich was illegal."(1)

It was pointed out, however, by the Tribunal that " the doctrine of military necessity has been widely urged. In the various treatises on International Law there has been much discussion on this question. It has been the viewpoint of many German writers and to a certain extent has been contended in this case that military necessity includes the right to do anything that contributes to the winning of a war."

The Tribunal expressed itself as follows :

" We content ourselves on this subject with stating that such a view would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations. Nor does military necessity justify the compulsory recruitment of labour from an occupied territory either for use in military operations or for transfer to the Reich, nor does it justify the seizure of property or goods beyond that which is necessary for the use of the army of occupation. Looting and spoliation are none the less criminal in that they were conducted, not by individuals, but by the army and the State.

" The devastation prohibited by the Hague Rules and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal

(1) Elsewhere, in dealing with Reinhardt's responsibility the Tribunal said that " there is no international law that permits the deportation or the use of civilians against their will for other than on reasonable requisitions for the needs of the army, either within the area of the army or after deportation to rear areas or to the homeland of the occupying power. This is the holding of the I.M.T. judgment, and this consistently has been the holding of all the Nuremberg Tribunals. . . . There is no military necessity to justify the use of civilians in such manner by an occupying force. If they were forced to labour against their will, it matters not whether they were given extra rations or extra privileges, for such matters could be considered, if at all, only in mitigation of punishment and not as a defence to the crime." Of Hollidt, it was said : " The evidence in this case establishes without question the illegal use of civilian labour by units under the defendant's command with his knowledge and consent. This labour was not voluntary and involved the use of civilians in the construction of field fortifications contrary to international law." Regarding the deportation and slave labour as an offence against civilians, see also Vol. VII, pp. 53-8. On the question of war crimes committed against property rights, see Vol. IX, pp. 39-43, and Vol. X, pp. 159-66.

of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature. We do not feel that in this case the proof is ample to establish the guilt of any defendant herein on this charge."

The Tribunal then made the following remark :

" Concerning the treatment of Red Army soldiers, the Hague Conventions provide :

' Article 1

' The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions :

(1) To be commanded by a person responsible for his subordinates ;

(2) To have a fixed distinctive emblem recognizable at a distance ;

(3) To carry arms openly ; and

(4) To conduct their operations in accordance with the laws and customs of war.

' In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination " army ".'

" This Article defines what constitutes a lawful belligerent.(1) Orders to the effect that Red Army soldiers who did not turn themselves over to the German authorities would suffer penalty of being treated as guerrillas, and similar orders, and the execution of Red Army soldiers thereunder, are in contravention of the rights of lawful belligerents and contrary to International Law.

" It has been stated in this case that American occupational commanders issued similar orders. This Tribunal is not here to try Allied occupational commanders but it should be pointed out that subsequent to the unconditional surrender of Germany, she has had no lawful belligerents in the field."

(xiii) *The Findings on Counts II and III*

The findings of the Tribunal as to von Leeb were as follows :

" For the reasons above stated we find this defendant guilty under Count III of the Indictment for criminal responsibility in connection with the transmittal and application of the Barbarossa Jurisdiction Order. Under Control Council Law No. 10 it is provided that superior orders do not constitute a defence but may be considered in mitigation of an offence.

" We believe that there is much to be said for the defendant von Leeb by way of mitigation. He was not a friend or follower of the Nazi Party or its ideology. He was a soldier and engaged in a stupendous campaign with responsibility for hundreds of thousands of soldiers, and a large indigenous population spread over a vast area. It is not without significance that no criminal order has been introduced in evidence which bears his signature or the stamp of his approval.

(1) Regarding the status of belligerent, see also Vol. V, pp. 27-30.

" We find on the evidence in the record, and for the reasons above stated, the defendant is guilty under Count III of the Indictment, and not guilty under Count II thereof."

Sperrle and Schniewind were found not guilty under Counts II and III. Von Kuechler, Hoth, Reinhardt, von Salmuth, Hollidt, von Roques, Rienecke, Warlimont, Woehler and Lehmann were found guilty under Counts II and III.

(xiv) *The Sentences*

The Tribunal, before meting out sentence, said that: " Each defendant receiving a sentence for a term of years shall receive credit upon the sentence imposed upon him for such a period or periods of time as he has been in confinement, whether as a prisoner of war or otherwise, since 7th May, 1945."

The sentences passed upon the accused found guilty were as follows:

To life imprisonment: Hermann Reinecke and Walter Warlimont.

To twenty years' imprisonment: Georg Karl Friedrich Wilhelm von Kuechler, Hans von Salmuth and Karl von Roques.

To fifteen years' imprisonment: Hermann Hoth and Hans Reinhardt.

To eight years' imprisonment: Otto Woehler.

To seven years' imprisonment: Rudolf Lehmann.

To five years' imprisonment: Karl Hollidt, and

To three years' imprisonment: Wilhelm von Leeb.

At the time of going to press these sentences had not been confirmed.

(xv) *A Defence Motion*

After the passing of sentences one of the Defence Counsel rose and spoke as follows:

" Your Honours, on behalf of the entire defence, I should like to make a brief statement. The defence has ascertained that the judgment just pronounced is in contradiction with the decisions of other military tribunals in Nuremberg with respect to basic and important legal points. In accordance with Ordinance No. XI,(1) the defence asks the military tribunals to make a decision on that point by calling plenary session of all Tribunals. The substantiation of this motion will be handed in later in view of the time period allowed in that Ordinance."

On the following day the President of the Tribunal ruled on this motion:

" The Tribunal considered the judgments of other tribunals heretofore rendered in arriving at the judgment in this case and is of the opinion there is no conflict with them and does not desire to hear argument on the motion. Accordingly, the motion for a plenary session filed on behalf of all of the defendants is overruled without prejudice to such further rights in the matter as defendants may have."(2)

(1) See Vol. IX, pp. 58-9.

(2) This finding illustrates the comment made in the notes to the *Flick Report* (in Vol. IX, p. 59) that " the convening of a joint session is within the discretion of the presiding judge and it is not obligatory that a joint session should be held upon a motion being received from Counsel."

B. NOTES ON THE CASE

1. THE PROTECTION OF PRISONERS OF WAR

A glance at the contents of the Judgment delivered in this, the *High Command Trial*, will reveal that a considerable number of separate legal matters were dealt with by the Tribunal. Its treatment of some of these questions does not break any fresh ground, and calls for no more than footnote cross-reference to material contained in earlier volumes in this series. The words of the Judgment on the protection of prisoners of war, however, are among these which call for more extended comment.

The Tribunal *substantially* adopted the opinion of the International Military Tribunal that the Hague Convention No. IV of 1907 had by 1939 become recognized as being merely declaratory of existing International Law, and that its provisions bound all belligerents irrespective of signature and despite the " general participation " clause.(1)

Any attempt to make an identical approach to the Geneva Prisoners of War Convention of 1929(2) meets, however, with the possible objection, which the Tribunal recognized,(3) that it contained " certain detailed provisions pertaining to the care and treatment of prisoners of war," which can hardly be regarded as merely expressing accepted usages and customs of war. The Tribunal, faced with this problem, was not content to declare, as it did, that the Convention was binding in so far as it was " in substance an expression of International Law as accepted by the civilized nations of the world,"(4) but went further and cited a number of articles therefrom(5) which it regarded as definitely being " an expression of the accepted views of civilized nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia."(6)

Counsel for von Salmuth had submitted in his closing speech that:

" According to the IMT Judgment only the principles of general International Law, namely of International Common Law, and not the Geneva Convention, are applicable to Russian prisoners of war. It remains to be ascertained what this common law constitutes. Common law is that law which is in keeping with the conscience of the civilized world and which took root in the minds of all fair-minded men. That means, however, that Common Law is composed of the requirements of humanity. A violation of Common Law must outrage the conscience of a fair-minded person. That is the case with considerable and serious offences against humanity, for instance murder and ill-treatment of prisoners of war."

It will be seen that most of the provisions of the Geneva Convention which the Tribunal regarded as being merely declaratory of customary International Law did in fact provide against acts of obvious ill-treatment

(1) See pp. 86-87.

(2) The problem here is one of applicability of the provisions of the Convention to non-signatories, no " general participation " clause being involved.

(3) See p. 89.

(4) See p. 88.

(5) And from the Hague Convention, indicating that the Tribunal did not regard the latter as being *completely* a codification of recognized usage.

(6) See pp. 90-1.

or neglect of prisoners of war. In rather a special category is Article 50, relating to the lenient punishment of prisoners of war for attempting to escape, which in effect recognized that prisoners of war must necessarily desire escape and feel under a duty to attempt it, if the opportunity presents itself.

The Tribunal expressed opinions upon certain questions of detail in the field of the protection of prisoners of war and these receive treatment in the following paragraphs :

(i) In his closing speech, Counsel for von Salmuth maintained :

" Article 6 of the Hague Rules for Land Warfare prohibits any employment of prisoners of war on work connected with military operations. This prohibition, as already shown by the first World War, was too far-reaching. Observance of this excessive demand was impossible, since in the switch-over of the entire economy to meet the requirements of war there remained hardly any work which could in no way increase the power of resistance of the detaining State. After several interim solutions, the Geneva Convention of 1929 therefore prohibited only such work as was directly connected with military operations. This modification is no more than an inadequate emergency-solution of the problem.

" The dividing line between whether work is directly or indirectly connected with military operations is debatable. The more the conduct of war develops towards total war the more intensive will be the penetration of rear area districts and the homeland by the progressive methods of war, and the more difficult it will become to distinguish whether work is directly or indirectly connected with military operations. Of more importance than whether a certain kind of work is indirectly or directly connected with military operations is therefore, in the opinion of professors of International Law, Oppenheim-Lauterpacht, Scheidl and other authors, the distinction between work aimed at annihilating soldiers or civilians of the prisoners' homeland and work which merely serves to protect the members of the detaining State from destruction.(1) It is therefore fundamental to distinguish between work serving purposes of aggression and work serving purposes of defence. Prisoners of war cannot be expected to take part in aggressive operations against their own country. On the other hand it is not unethical if they are required to assist in defensive works. The construction of field positions and fortifications will always serve the purpose of defence.

(1) The Sixth Edition (Revised) of Oppenheim-Lauterpacht, *International Law*, Vol. II, p. 298, stated : " As to prohibited work Article 31 lays down as follows : ' Work done by prisoners of war shall have no direct connection with the operations of the war. In particular it is forbidden to employ prisoners in the manufacture or transport of arms destined for the combatant units.' These prohibitions are not altogether free of ambiguity. . . . The term ' direct connection ' is not limited to work done in the fighting zone. For according to other provisions of the Convention—Articles 7 and 9—prisoners ought as a rule to be placed outside the fighting zone. But does it cover the digging of trenches and building of fortifications in places removed from the military operations ? It will also be noted that Article 31 probably does not exclude the manufacture of war material other than arms and munitions, provided again that it has no direct connection with military operations. The question whether prisoners of war can be compelled to construct fortifications and the like is just as much controverted as the question whether enemy civilians can be forced to do such work."

"This is not prohibited in Article 31 of the Geneva Convention. A motion by the Rumanian Delegation at the Conferences on the Geneva Convention provided for the insertion of the following words in Article 31, paragraph 1, under prohibited works: 'work in connection with trenches and fortifications.' This motion, however, was rejected by the conference. It is therefore proved that these defensive works were regarded as admissible by those participating in the conference.

"The Soviets, as already mentioned, constantly employed German prisoners of war for the construction of field posts in the front lines and in the firing area. Therefore, according to the principle of adaptation to the Russian labour-allocation of German prisoners of war, it was possible to employ Russian prisoners of war in the construction of field posts as far as this work did not expose the prisoners of war to enemy action."

Possibly having these arguments in mind, the Tribunal held that "in view of the uncertainty of International Law as to" the question of the "use of prisoners of war in the construction of fortifications," "orders providing for such use from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal upon their face but a matter which a field commander had the right to assume were properly determined by the legal authorities upon higher levels."(1) The Tribunal did not declare that such orders would in no possible circumstances be illegal but simply that they were not obviously legal, and it would appear that the Tribunal here applied a special rule as to superior orders which differs from the general rule(2) in that the orders in question, being not obviously illegal, would constitute a complete defence and not simply a circumstance which may be argued in mitigation of punishment.

(ii) Proof of obvious illegality would lie in the danger to which the prisoners were exposed; among those provisions of the Hague and Geneva Conventions which the Tribunal regarded as merely declaratory of customary International Law(3) appeared some "prohibiting their use in dangerous localities and employment." The Tribunal continued: "We consider their use by combat troops in combat areas for the construction of field fortifications and otherwise to constitute dangerous employment under the conditions of modern war." Elsewhere, quoting evidence showing that prisoners had been used for mine-clearing, for "billet and field fortifications," and in supply units, the Tribunal said: "We do not find all of the above uses of prisoners of war criminal. To use them for field fortifications, loading ammunition, for mine clearing, and any other work that is dangerous was clearly prohibited by International Law and constitutes a war crime." In dealing with Hoth's responsibility the Tribunal again stressed its requirement that danger to prisoners should be proved: "The use of prisoners of war to load ammunition was contrary to International Law. We have elsewhere in the opinion discussed what work is or is not permissible for prisoners of war. We cannot say that the evidence shows as to Hoth, except for the matter of loading ammunition, a use of prisoners of war that was unlawful, for it does not appear that any of it was done at the front or

(1) See pp. 88-9.
(2) See Vol. V, pp. 19-22.
(3) See pp. 90-1.

in a dangerous location. Similarly, of Hollidt it was said: " When the defendant was in command of the Armeeabteilung Hollidt in the 6th Army . . . he was in the course of retreat which covered some 1,500 kilometres, and his army was in a difficult and deplorable condition at various periods during this retreat, and he defended his use of prisoners of war to some extent upon the exigencies of the situation which confronted him. This constitutes no legal defence but is only in mitigation. From the factual point of view that the defendant was in retreat and subject to heavy, unexpected attacks it is evident that the employment of prisoners of war in constructing field fortifications and for labour with combat units necessarily put them in a position of greater danger than the same use would have subjected them to on a more stable front.

" The evidence in this case shows that over a wide period of time prisoners of war were used in the combat zone for the construction of field fortifications by units subordinate to him which could only have been done with his knowledge and approval. Reports show that prisoners of war were in fact killed and injured by an attack from enemy mortars.

" We can only find from the evidence that prisoners of war were used under the defendant in hazardous work with the knowledge and approval of the defendant and that he is criminally responsible therefor."

In the *Milch Trial* the criterion used to determine the criminality or otherwise of the use of prisoners of war was the connection or otherwise between their work and " the operations of war " ; Article 31 of the Geneva Prisoners-of-War Convention was quoted in this connection :

> " *Article* 31. Work done by prisoners of war shall have no direct connection with the operations of the war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units.
>
> " In the event of violation of the provisions of the preceding paragraph, prisoners are at liberty, after performing or commencing to perform the order, to have their complaints presented through the intermediary of the prisoners' representatives whose functions are described in Articles 43 and 44, or, in the absence of a prisoners' representative, through the intermediary of the representatives of the protecting Power."[1]

In the trial of Tanabe Koshiro by a Netherlands Temporary Court Martial at Macassar,[2] the court was called upon to decide not only whether prisoners of war had been unnecessarily exposed to danger but also whether such prisoners had been employed in war work. The court had no hesitation in applying two tests (exposure to danger and connection with war work) to the relevant facts and specifically found that the building of ammunition

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(1) See Vol. VII, pp. 43 and 47. The Tribunal, acting in the *High Command Trial*, had no hesitation in applying *the rule expressed* in Article 31 to the manufacture of arms by prisoners of war : " This and other evidence in this case," it said, " clearly establishes the illegal use of French prisoners of war in the manufacture of arms and munitions and the defendant's (Reinecke's) knowledge thereof." It was the use of prisoners of war on the construction of fortifications which the Tribunal appears to have been reluctant to declare invariably criminal.

(2) See Vol. XI, pp. 1-4.

dumps or depots constituted " work connected with the operations of war."(1) As the notes to the report on that trial point out, conventional International Law has specifically provided for the possible application of either test, since Article 6 of the Hague Regulations and Article 31 of the Geneva Convention refer to " connection with the operations of the war " and Article 7 of the latter to exposing prisoners of war to danger. (The general prohibition contained in Article 7 would of course cover the use of prisoners of war on dangerous *work.*)

In the *I.G. Farben Trial* the Tribunal pointed out that the use of prisoners of war in war operations and in work having a direct relation to such operations was prohibited by the Geneva Convention.(2) The Judgment delivered in the *Krupp Trial* cited the first paragraph of Article 31 of the Geneva Convention (and Article 6 of the Hague Convention) among a number of Articles from the Hague and Geneva Conventions and said that " practically every one of the foregoing provisions were violated in the Krupp enterprises."(3)

Neither did the International Military Tribunal see reason for not applying Article 31 of the Geneva Convention, although it should be added that the element of danger was also referred to when the Tribunal dealt specifically with, *inter alia,* the digging of trenches, which would fall within the category of fortifications :

" Many of the prisoners of war were assigned to work directly related to military operations, in violation of Article 31 of the Geneva Convention. They were put to work in munition factories and even made to load bombers, to carry ammunition and to dig trenches, often under the most hazardous conditions."(4)

The Tribunal acting in the *I.G. Farben Trial* appeared to feel, as did that acting in the *High Command Trial,* that the interpretation of Article 31 was not entirely clear. Of the employment of prisoners of war, the Tribunal said : " The use of prisoners of war in war operations and in work having a direct relation to such operations was prohibited by the Geneva Convention. Under Count III the defendants are charged with violations of this prohibition. To attempt a general statement in definition or clarification of the term ' direct relation to war operations ' would be to enter a field that the writers and students of International Law have found highly controversial. We therefore limit our observations to the particular facts presented by this record ", and at an earlier point, " The use of prisoners of war in coal mines in the manner and under the conditions disclosed by this record,

(1) *Ibid.,* pp. 2-3.
(2) See Vol. X, p. 54.
(3) See Vol. X, p. 141.
(4) British Command Paper Cmd. 6964, p. 59. The Tribunal interpreted widely the parallel rule prohibiting the use of civilian workers " in military operations against their own country " ; see Vol. VII, p. 54.

It is of interest to note that the XVIIth International Red Cross Conference, which met in Stockholm on 20th-30th August, 1948, approved, *inter alia,* a proposal to revise the Geneva Prisoners of War Convention of 1929 : Article 43 of its revised Convention provides against dangerous or humiliating work, but in Article 42 the second of the two criteria referred to in the text above is also laid down : " prisoners of war," the Article runs, " . . . may not be employed on work which, moreover, would be useful for the conduct of active military operations " (*ne pourrant pas être employés à des travaux qui, en outre, seraient utiles à la conduite d'opérations militaires actives*).

we find to be a violation of the regulations of the Geneva Convention and, therefore, a war crime."(1)

It must be conceded that prosecuting staffs have preferred to charge accused with exposing prisoners of war to danger rather than with employing them in work directly connected with operations of war, when the facts of cases could have given reasonable prospects of a conviction on either. In the trial of Lt. Kazuhiko Imamura by an Australian Military Court at Rabaul, 25th July, 1947, both types of charge were brought. The substance of the evidence was to the effect that the accused was responsible for the employment of Indian prisoners of war and that as such he on numerous occasions used these prisoners for the unloading of ammunition, aeroplanes, petrol and other military equipment from the Japanese ships that stopped at Wewak. The prosecution alleged that the accused used numbers of the Indian prisoners in the construction and repair work of a Japanese airstrip at Wewak, which was subjected to bombing by Allied planes on many occasions, and that during these bombing raids the prisoners were not provided with sufficient shelter for their safety. The charges relating to these facts were as follows :

" Committing a war crime that is to say employment of prisoners of war on unauthorized work in that he at Wewak between the months of May and December, 1943, on numerous occasions employed Indian prisoners of war in the transport of arms and munitions," and

" Committing a war crime that is to say employment of prisoners of war on unauthorized work in that he at Wewak on 2nd December, 1943, employed Havildar Salamud Din an Indian prisoner of war and other Indian prisoners of war on dangerous work, namely the digging of drains on an airstrip at Wewak which was subject to aerial bombardment without making adequate provisions for the safety of such prisoners of war."

The accused was found guilty on these charges and sentenced to twelve months' imprisonment.

(iii) It was also apparent in the opinion of the Tribunal conducting the *High Command Trial* that under customary International Law " the execution of prisoners of war for attempts to escape was illegal and criminal."(2) The same decision reached by an Australian Military Court on this point has already been noted in these Reports.(3) As the prosecution claimed in its Memorandum on the alleged responsibility under Counts II and III of von Kuechler :

" It is not necessary to dwell at length on the criminality of executions of soldiers for their escape from prisoner-of-war camps. It is not only perfectly permissible for captured soldiers to escape from captivity in order to rejoin their forces ; it is their duty to do so, if they are able. Article 50 of the Geneva Convention provides :

' Escaped prisoners of war who are retaken before being about to rejoin their own army or to leave the territory occupied by the army which captured them, shall be liable only to disciplinary punishment. Prisoners who, after having succeeded in rejoining their army or in

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(1) See Vol. X, p. 54.
(2) See p. 92.
(3) See Vol. VII, p. 61.

leaving the territory occupied by the army which captured them, may again be taken prisoner, shall not be liable to any punishment on account of their previous flight.'

" In Article 51, it is stated that :

' Attempted escape, even if it is a repetition of the offence, shall not be considered as an aggravating circumstance in case the prisoner of war shall be given over to the courts on account of crimes or offences committed in the course of that time.'

" Article 52 :

' Belligerents shall see that the competent authorities exercise the greatest leniency in deciding the question of whether an infraction committed by a prisoner of war shall be punished by disciplinary or judicial measures. This shall be the case especially when it is a question of deciding on acts connected with escape or attempted escape.'

" Finally, Article 54 :

' Arrest is the most severe disciplinary punishment which may be imposed on a prisoner of war. The duration of a single punishment may not exceed thirty days.' "

(iv) Having ruled that " it was . . . legal for field commanders to transfer prisoners of war to the Reich and thereafter their control of such prisoners terminated " the Tribunal was not called upon to decide as to the illegality of the use of prisoners of war in the manufacture of arms and munitions.(1)

In the *Milch Trial*, it will be recalled, the accused was found guilty of, *inter alia*, the illegal use of prisoners of war in the German arms industry, (2) but the position of Milch was not that of a field commander.

(v) Counsel for von Roques argued as follows before the Tribunal :

" One can however not say that a military commander is acting in neglect of duty if he does not supervise the police of his own State. In every country of the world the police enforce law and order, and there is no cause to suspect from the outset that the highest police functionaries are criminal who require supervising like professional criminals. This, however, is the ultimate consequence of the charge that the military commanders automatically had the obligation to supervise the police. Such unconditional obligation can be reasoned only by saying that the individual commanders knew, or were bound to know, or at least to suspect, that behind the activity of the police was concealed naked murder. Where, however, is the evidence that even one military commander knew this, suspected or even ought to have suspected it ; above all, however, where is the evidence that any of these points would apply to my client."

The Tribunal, however, ruled :

" Orders which provided for the turning over of prisoners of war to the SD, a civilian organization, wherein all accountability for them is shown

(1) See p. 89.
(2) See Vol. VII, pp. 43 and 47.

by the evidence to have been lost, constituted a criminal act, particularly when from the surrounding circumstances and published orders, it must have been suspected or known that the ultimate fate of such prisoners of war was elimination by this murderous organization."(1)

A close comparison of this statement with the rule, quoted above, that "it was . . . legal for field commanders to transfer prisoners of war to the Reich and thereafter their control of such prisoners terminated" shows that the former was probably intended to refer to transfers to the SD, within the area of the accused commander, whereas the latter was meant to refer to transfers to Reich territory under the normal civilian administration.

It will be noted, from the use of the word "particularly," that a commander is criminally responsible if he hands over prisoners to the SD within his area of command even when it cannot be "suspected or known that the ultimate fate of such prisoners of war was eliminated by this murderous organization."

In its treatment of von Salmuth's guilt the Tribunal said :

"Concerning the treatment of prisoners of war in the areas under the defendant, numerous reports from these areas show what must be considered as an excessive number of deaths by shooting and otherwise among the prisoners of war. They imply a degree of negligence on the part of the defendant but we need not discuss this question. These reports show that prisoners of war were handed over to the SD, a police organization, and that thereafter the army exercised no supervision over them and apparently had no control or record as to what became of them.

"Whether or not they were liquidated, as many of them undoubtedly were, is not the question. The illegality consists in handing them over to an organization which certainly by this time the defendant knew was criminal in nature."

Here it will be noted however that the accused was said to have known that the SD was "criminal in nature." In dealing with the Commando Order itself the Tribunal after quoting it and indicating its authorship and date, simply added : "This order was criminal on its face. It simply directed the slaughter of these 'sabotage' troops.

"The connection of certain defendants with it is treated in the discussion of the individual cases."

The Judgment of the International Military Tribunal, while it did not specifically rule that the handing over of prisoners of war to the SD by the military authorities was illegal, refers to the practice in words which leave the impression that they did regard it as a wrongful act :

"In the course of the war, many Allied soldiers who had surrendered to the Germans were shot immediately, often as a matter of deliberate, calculated policy. On the 18th October, 1942, the defendant Keitel circulated a directive authorized by Hitler, which ordered that all members of Allied 'Commando' units, often when in uniform and whether armed or not, were to be 'slaughtered to the last man,' even if they attempted

(1) See p. 92.

to surrender. It was further provided that if such Allied troops came into the hands of the military authorities after being first captured by the local police, or in any other way, they should be handed over immediately to the SD. This order was supplemented from time to time, and was effective throughout the remainder of the war, although after the Allied landings in Normandy in 1944 it was made clear that the order did not apply to 'Commandos' captured within the immediate battle area. Under the provisions of this order, Allied 'Commando' troops, and other military units operating independently, lost their lives in Norway, France, Czechoslovakia and Italy. Many of them were killed on the spot, and in no case were those who were executed later in concentration camps ever given a trial of any kind. For example, an American military mission which landed behind the German front in the Balkans in January, 1945, numbering about twelve to fifteen men and wearing uniform, were taken to Mauthausen under the authority of this order, and according to the affidavit of Adolf Zutte, the adjutant of the Mauthausen Concentration Camp, all of them were shot."(1)

In the trial of Nickolaus von Falkenhorst by a British Military Court at Brunswick the accused was found guilty on charges, among others, of handing over prisoners of war to the SD, but the charges always add: "with the result that the said prisoners were killed."(2)

The balance of authority seems, however, to indicate that the mere act of handing prisoners of war over to the SD within his command territory would make a commander criminally responsible, irrespective of his state of knowledge *and possibly irrespective of the actual fate of the prisoners.*

(vi) The following passages appear in the Tribunal's treatment of the alleged guilt of the accused Hoth:

"Under date of 29th October, 1941, in the war diary of the Oberquartiermeister of Hoth's 17th Army, appears the following:

> 'The billeting of PoW's captured in the city and some of the inhabitants of the country in the buildings used by our own troops has proven to be a useful counter measure against the time bombs put there by the enemy. It has been our experience, that, as a result of this measure, the time bombs were found and rendered harmless in a very short time by the prisoners and/or the inhabitants of the country.'

"To use prisoners of war as a shield for the troops is contrary to International Law.(3)

"Hoth said he gave no orders that this be done and he did not think it was done in his army. However, he admits knowing that prisoners of war were used as a shield for German troops in another army and states that he thought his Oberquartiermeister was reporting on that."

(1) British Command Paper Cmd. 6964, p. 45.
(2) See Vol. XI, pp. 18-19.
(3) Compare Article 9 of the Geneva Convention, quoted by the Tribunal at an earlier point (see p. 90).

It will be recalled that Kurt Student was charged, *inter alia*, with " the use . . . of British prisoners of war as a screen for the advance of German troops," when tried by a British Military Court at Luneberg.(1) Although he was found not to have been responsible for such acts and although the charge also alleged that certain of the prisoners were killed while being used as a shield, there seems little doubt that, if proved, the mere act of forcing prisoners of war to go ahead of advancing enemy troops, thereby acting as a shield to the latter, would itself constitute another type of war crime.

(vii) Finally the Tribunal stressed the obligation resting upon the captor, even under customary International Law, to ensure " the proper care and maintenance of prisoners of war."(2)

The trial of Arno Heering by a British Military Court at Hanover provides an illustration of the enforcement of this obligation while the notes to the report of the case in this series recite some of the relevant articles on the Geneva Convention.(3)

(viii) The Tribunal made the following ruling, while dealing with the alleged responsibility of Reinecke, which though not setting out further the rights of prisoners of war may conveniently be quoted at this point:

" The evidence in this case established the use of French prisoners of war in the manufacture of arms contrary to the Geneva Convention which was binding upon Germany as to French prisoners of war. It is alleged that this was done by agreement with the ambassador of the Vichy Government to Berlin. There is no evidence of any agreement by the Vichy Government in this case.

" This matter was considered in both the case of the United States against Milch and the case of the United States against Krupp, *et al.*, both of which Tribunals held such use illegal.(4) We are of the opinion, for substantially the reasons cited in the Krupp case, that if any such agreement existed, it was contrary to International Law. Certainly a conquering power cannot set up and dominate a puppet government which barters away the rights of prisoners of war while the nationals of that country under substantial patriotic leadership are still in the field."

2. THE RESPONSIBILITY OF COMMANDERS FOR OFFENCES COMMITTED BY THEIR TROOPS

The problem of the extent to which a superior, military or civilian, may be held responsible for war crimes committed by his troops or inferiors, particularly for those not explicitly shown to have been actually ordered by him, has been the subject of comment at several points in these Volumes.(5) It is not surprising that the problem was also a prominent one in the *High Command Trial.*

(1) See Vol. IV, pp. 118-124.
(2) See p. 91.
(3) See Vol. XI, pp. 79-80.
(4) See Vol. VII, pp. 38 and 46, and Vol. X, p. 141.
(5) See Vol. IV, pp. 83-96, Vol. VII, pp. 61-64, Vol. VIII, pp. 88-9, and Vol. IX, p. 54.

The Judgment contains a number of examples of the well-established(1) responsibility of a superior for offences ordered by him. Thus of von Leeb and the Barbarossa Jurisdiction Order it was said :

" It was a criminal order, at least in part. It was further an order that was at best ambiguous in respect to the authority conferred upon a junior officer to shoot individuals who were merely suspected of certain acts. There is nothing to show that in the transmittal of this order, it was in any way clarified or that instructions were given in any way to prevent its illegal application. The evidence establishes that von Leeb implemented this order by passing it into the chain of command. Coming directly through him in the chain of command, it carried the weight of his authority as well as that of his superiors. The record in this case shows that it was criminally applied by units subordinate to him. Having set this instrument in motion, he must assume a measure of responsibility for its illegal application."

The more interesting question is the extent to which a commander may be held criminally responsible for offences of his subordinates which he was not shown to have ordered. The Judgment has many interesting passages relevant to this point.

The Tribunal dealt first with the position of a commanding officer who knows that men under his command are committing violations of International Law in pursuance of orders from *his superiors* passed down independently of him. While admitting the difficulty of his position,(2) the Tribunal held that " by doing nothing he cannot wash his hands of international responsibility. His only defence lies in the fact that the order was from a superior which Control Council Law No. 10 declares constitutes only a mitigating circumstance."(3)

Applying this principle the Judgment said of the accused von Kuechler :

" As to the responsibility of the defendant von Kuechler for the criminal execution of Red Army soldiers and prisoners of war, a number of documents have been called to our attention. These comprise generally orders of the OKH under which these illegal executions were carried out. An examination of these orders, however, fails to adequately establish the defendant's transmittal of them. However, it is not considered that this fact relieves him from criminal responsibility in connection with these acts.

" Subsequent to the time that the defendant assumed command of the Army Group North, the record discloses that numerous reports showing such illegal executions were made to his headquarters, covering a wide period of time. These reports must be presumed in substance to have been brought to his attention. In fact, his own testimony indicates he was aware of these reports. There is no evidence tending to show any corrective action on his part. It appears from the evidence therefore that he not only tolerated but approved the execution of these orders.

(1) See, for instance, Vol. IV, p. 84.
(2) See p. 74.
(3) See p. 75. This is interesting as a rare example of the application of this provision to afford some protection to a person other than that to whom the order was addressed.

" He must therefore be held criminally responsible for the acts committed by his subordinates in their illegal execution of Red Army soldiers and escaped prisoners of war."

In his closing speech Counsel for von Roques put forward the following argument:

" The obligations towards the civilian population, as laid down in International Law, rest upon the State as such. It is on the other hand entirely left to the State to appoint in a specific instance the agent who shall carry out the occupational duties. There is no obligation under International Law to assign this task exclusively to the Armed Forces. In my opinion, it is entirely left to the occupying power to transfer the duties which it incurs under International Law either to its Armed Forces or to civilian agencies. It is beyond doubt that the occupying power must maintain peace and order, that it must create an administration, that it assumes the power previously held by the enemy. In my opinion nothing is laid down in International Law with regard to the occupying power selecting the means for discharging these duties by establishing a military administration or a civil administration or by combining both of these agencies."

The Tribunal was willing to admit that a commanding general's responsibility under International Law for conditions in territory under the occupation of his troops could to some extent be affected by his status under the military and other municipal laws of his country.(1) The responsibility of commanders of occupied territories was said to be fixed by, *inter alia*, " the authority of the commander which has been delegated to him by his own Government. . . .(2) It must be borne in mind that a military commander, whether it be of an occupied territory or otherwise, is subject both to the orders of his military superior and the State itself as to his jurisdiction and functions." The *Yamashita Case* was distinguished from the present on the grounds of a differing extent of authority permitted by the State to the accused involved.(3)

In the Tribunal's opinion, however, the doctrine that a commander's governmental authorities may in effect relieve him of certain of his responsibility under International Law has its limits: ". . . under International Law and accepted usages of civilized nations " a military commander in an occupied area " has certain responsibilities which he cannot set aside or ignore by reason of activities of his own State within his area."(4) Furthermore, the Tribunal seems to have felt that, while none of the accused had the wide powers of a Yamashita, their authority was nevertheless very extensive.(5) The accused would be responsible for all crimes committed

(1) This possibility has not previously received attention in reasoned Judgments reported in these Volumes. The decision of the Supreme Court in the *Yamashita Case* laid down the duty of a commander to take such measures as were *within his power* and appropriate in the circumstances to protect prisoners of war and the civilian population (see Vol. IV, pp. 42-4). The Supreme Court did not use the words " within his authority " and would appear to have meant " within his physical power."

(2) See p. 75.

(3) See p. 76.

(4) See pp. 76-7.

(5) See pp. 77-8.

by the Einsatzgruppen of the Security Police and SD of which they had knowledge and which they neglected to suppress.(1)

The specific reference to the Einsatzgruppen arose from the fact that the defence had asserted " that the executive power of field commanders did not

(1) See p. 79. The Prosecution's theory as to the responsibility of a commanding general is revealed in the following paragraphs taken from the Memorandum on the responsibility of von Kuechler under Counts II and III:

" The annex to the 4th Hague Convention lays down as the first condition which an armed force must fulfil in order to be accorded the right of a lawful belligerent that ' it must be commanded by a person responsible for his *subordinates* ' (Annex to the 4th Hague Convention, Article I). Implicit in this rule is the point that in a formally organized army, the commander is at all times required to control his troops. He is responsible for the criminal acts committed by his subordinates as a result of his own inaction. As the Supreme Court of the United States held in *Re Yamashita*:

> " ' These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized and its breach penalized by our own military tribunals.' . . .

" Most extensive rights and corresponding responsibilities are conferred by positive provisions of international law upon the commanding general in occupied territory. Articles 42-56 of the Hague Regulations contain the rules and rights of the occupant. The heading of Section III of the Hague Regulations mentions specifically the ' military authority over the territory of the hostile State.' Article 42 declares that ' territory is considered occupied when it is actually placed *under the authority of the hostile army*.' Article 43 imposes the duty on the occupant to restore and to ensure public order and safety and to respect the laws in force in the country, ' the authority of the legitimate power having, in fact, passed into the hands of the occupant.' In Article 57, it is expressly stated that no contribution shall be collected except under local order and on the responsibility of a *C.-in-C.*

" It follows that international law acknowledges no other bearer of executive power except the commander of the occupying army, and for this reason a unilateral delegation of this power to some agency other than the military commander is not recognized by international law, and is ineffective to relieve the military commander, *pro tanto*, of his duties and responsibilities."

Counsel for von Kuechler replied:

" The Prosecution attempts to explain these Rules of Land Warfare in such a way that it would appear that Field-Marshal von Kuechler, in his capacity of Commander-in-Chief, was territorially responsible for everything that happened at any time in the occupied enemy area.

" However, such a territorial responsibility exists neither in the practice nor in the theory of International Law. Even the Supreme Court in its judgment of Yamashita could not decide to recognize such a responsibility. Such a responsibility—to use the words of the judgment of the jurists—would lead to the result:

> " ' that the only thing for a Tribunal in a case would be to pronounce the declaration of guilty. . . .'

" The Yamashita Judgment, therefore, also takes the factual jurisdiction as a basis. Time and again it speaks of the armed forces under the orders of the Commander-in-Chief, of the soldiers who were bound to carry out his orders, of the units which he commanded.

" The judgment against Field-Marshal List (Case 7, Military Tribunal V) cannot be interpreted in the meaning of territorial responsibility either, although there may be some items which point in this direction. The decisive factor is that the judgment always examines the factual jurisdiction. In this connection I want to refer to the expositions as on pages 10377 and 10419 of the German transcript. In the last-named case, the Tribunal investigated the relation of subordination of an SS Police Leader and the Tribunal would have no need to undergo this work if it was to affirm unreservedly the maxim of territorial responsibility. It can be inferred herefrom that there will be a personal responsibility of a Commander-in-Chief only if:

(1) An action took place in the territory which he controlled, or

(2) If it was committed by somebody who was under his orders.

" It is significant that the Hague Convention on Land Warfare only speaks of the ' Occupying Power ' and by this means the Occupying State. The counterpart of the indigenous civilian population, therefore, is not an individual person, but the occupying State. And that is only logical, because the war against the Soviet Union had been declared by the German Reich and not by some Commander-in-Chief, as, for instance, by Field-Marshal von Kuechler."

extend to the activities of certain economic and police agencies which operated within their areas."(1) It will be recalled that the Tribunal before which the *Hostages Trial* was held expressed the same opinion as the present Tribunal and a part of the Judgment in that Trial was quoted, *inter alia*, by the Tribunal acting in the *High Command Trial* in dealing with the responsibility of von Roques :(2)

" Von Roques' testimony discloses that he had in the area of his command executive power as the representative of the occupying power in his area. He stated that he owed a duty to the civilian population because he needed its co-operation. Neither his testimony nor his actions show that he appreciated the fact that he owed a duty as an occupying commander to protect the population and maintain order.

" General Halder in his testimony succinctly defined executive power :

> ' The bearer of executive power in a certain area unites all the legal authorities of a territorial nature and legislative nature in his own person.'

" The responsibility incident to the possession of executive power is well stated in the Judgment of Tribunal V, Case No. 7, U.S. vs. Wilhelm List, *et al.*, as follows :

> '. . . This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territory having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent or approval of these defendants. But this cannot be a defence for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence.'

" In the Yamashita case decided by the Supreme Court of the United States, on which case we have elsewhere commented in the Judgment, it is stated :

> ' These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances *to protect prisoners of war and the civilian population.*' (Emphasis supplied.)

" We are of the opinion that command authority and executive power obligate the one who wields them to exercise them for the protection of prisoners of war and the civilians in his area ; and that orders issued which indicate a repudiation of such duty and inaction with knowledge that others within his area are violating this duty which he owed, constitute criminality. The record shows orders by the defendant, knowledge, approval and

(1) See p. 75.
(2) See Vol. VIII of these Reports, pp. 69-70.

acquiescence in acts by troops under his authority, and by agencies within his area which violated the most elementary duty and obligations owed to prisoners of war and the civilian population by the commander of an occupying army, having command authority and executive power."

Further, it appears that, just as a commanding general has wide responsibilities under International Law, so also is he allowed considerable latitude in the ways in which he fulfils these responsibilities; the Tribunal held that " the duty imposed upon a military commander is the protection of the civilian population. Whether this protection be assured by the prosecution of soldiers charged with offences against the civilian population, or whether it be assured by disciplinary measures or otherwise, is immaterial from an international standpoint."(1)

The question whether a commander must have knowledge of the offences being committed by his underlings to be made criminally responsible for them is one on which there has been some division of authority.(2) The Judgment in the *High Command Trial* stated that a high commander " has the right to assume that details entrusted to responsible subordinates will be legally executed." Criminal responsibility does not automatically attach to him for all acts of his subordinates. There must be an unlawful act on his part or a failure to supervise his subordinates constituting criminal negligence on his part.(3) Later the Tribunal stated explicitly that " the commander *must have knowledge* of these offences and acquiesce or participate or criminally neglect to interfere in their commission and that the offences committed must be patently criminal."(4) A similar test was applied to offences committed by units taking orders from other authorities : " The sole question then as to such defendants in this case is whether or not they knew of the criminal activities of the Einsatzgruppen or the Security Police and SD and neglected to suppress them. . . . When we discuss the evidence against the various defendants, we shall treat with greater detail the evidence relating to the activities of the Einsatzgruppen in the commands of the various defendants, and to what extent, if any, such activities were known to and acquiesced in or supported by them."(5)

Similarly of von Leeb it was said :

" The evidence establishes that criminal orders were executed by units subordinate to the defendant and criminal acts were carried out by agencies within his command. But it is not considered under the situation outlined

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(1) See p. 83.

(2) In the *Flick Trial* the accused Flick was shown to have had " knowledge and approval " of the acts of a subordinate, Weiss, for which he was held jointly responsible : See Vol. IX, p. 54. The existing difference of opinion as to the question of the necessity of proof of knowledge or of presumed knowledge, and the question of the existence of a *duty to discover* whether crimes are being committed by subordinates has, however, been shown in Vol. IV, pp. 87-94, and in Vol. VII, pp. 61-63.

(3) See p. 76.

(4) See p. 77. (Italics inserted.) It will be noted that the last nine words of the passage quoted add a further restriction to the commander's responsibility, one not recognized in trials previously reported upon in these Volumes, in which trials it was assumed that if the commander knew that his subordinates were carrying out acts which were in fact illegal he would not then be able to plead that he did not know that such acts were illegal.

(5) See p. 79.

that criminal responsibility attaches to him merely on the theory of subordination and over-all command. He must be shown both to have had knowledge and to have been connected with such criminal acts either by way of participation or criminal acquiescence. . . .

" We are therefore unable to find from the evidence submitted that the defendant von Leeb had knowledge of the murder of civilians within his area by the Einsatzgruppen or acquiesced in such activities."

And on the question of his responsibility for neglect of prisoners of war it was said :

" Responsibility for prisoner-of-war affairs was therefore directly vested in the commanders of the armies and of the army group rear areas. Direct responsibility in these matters by-passed the commander-in-chief of the army group. While he had the right to issue orders to his subordinates concerning such matters, he also had the right to assume that the officers in command of those units would properly perform the functions which had been entrusted to them by higher authorities, both as to the proper care of prisoners of war or the uses to which they might be put. He also had the right as heretofore pointed out, to assume that certain uses to which they were put were legal under the conditions existing in the war with Russia. As we have stated, their use in dangerous occupations or in dangerous localities was obviously illegal under International Law but there is no substantial evidence that such illegal uses of prisoners of war were ever brought to the attention of the defendant."(1)

Of von Kuechler it was said : " We conclude that the defendant had knowledge of and approved the practice of using both prisoners of war and civilians for improper and dangerous work."(2)

It appears, however, that, in suitable circumstances, the requirement of knowledge may be dispensed with. Speaking of the *Maintenance of Discipline Order*,(3) the Tribunal said :

" Can those defendants escape liability because this criminal order originated from a higher level ? They know it was directed to units subordinate to them. Reports coming in from time to time from these subordinate units showed the execution of these political functionaries. It is true in many cases they said they had no knowledge of these reports. *They should have had such knowledge*.(4)

Of Sperrle the Tribunal said, *inter alia* :

" But even though we were disposed to accept his statement of his opposition to the [Commissar] order, the cold, hard, inescapable fact remains that he distributed it and that it was enforced by units subordinate to him in the 18th Army. Many reports were made by these subordinate units, which should have been known to him, that Commissars were being

(1) Compare also the references to the element of knowledge in the passage quoted on pp. 109-10.
(2) And see also a further passage previously quoted, relating to von Kuechler, on pp. 106-7.
(3) See p. 25.
(4) Italics inserted.

executed by them. He says he did not know of it. *It was his business to know,* and we cannot believe that the members of his staff would not have called these reports to his attention had he announced his opposition to the order."(1)

And of Reinhardt the Tribunal said, *inter alia*:

" In comments emanating from one of Reinhardt's staff officers relative to the suggestion for the formation of a Russian Red Cross, it is indicated that he was opposed to authorizing the Red Cross to make any search for prisoners missing in action and the reason which he gives is set forth with great frankness. It is as follows :

> ' Overwhelmingly large numbers of prisoners of war deceased without documentary deposition, and of civilians who disappeared due to brutal actions.'

" At this point we refer to the following finding of Tribunal V, in Case 7(2), and adopt it as a correct statement of the law. It is as follows :

> ' Want of knowledge of the contents of reports made to him (i.e., to the Commanding General), is not a defence. Reports to Commanding Generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.' "(3)

3. THE RESPONSIBILITY OF STAFF OFFICERS

The Tribunal held(4) that the fact that Geitner and Foersch were acquitted in the *Hostages Trial*(5) did not signify that staff officers were absolved from all criminal responsibility for matters in which their commanding officer could be held responsible. The Tribunal regarded as

(1) Italics inserted.

(2) *The Hostages Trial,* reported upon in Vol. VIII of this series, pp. 34-92.

(3) It will be noted that the last three quotations from the Judgment in the *High Command Trial* lay down that the accused *ought to have known* of certain facts, not that he *must be presumed to have known* of them. The former is a question of substantive law ; as to the different question of presumption of guilt or knowledge in charges of responsibility for the offences of subordinates, see Vol. IV, pp. 85-6 and 94-5, and Vol. VII, pp. 63-4. The Prosecution in the *High Command Trial* made a claim in their Memorandum on von Leeb's alleged responsibility under Counts II and III which postulated a presumption of guilt and knowledge :

" Where the proof shows the systematic and widespread commission of crimes, the officers in the chain of command are criminally responsible for such crimes if they have failed to take appropriate measures to prevent such acts by subordinates. Here the proof need show only the widespread *commission* of crimes by units *subordinated* to the defendant. Proof of widespread crime necessarily raises a presumption of failure to take appropriate measures to control subordinates. It is unnecessary to show that the defendant had knowledge of such crimes."

(4) See p. 80.

(5) See Vol. VIII, pp. 42-3, 75-6 and 89-90.

sound the finding in the previous trial(1) but held that " the facts in that case are not applicable to any defendant on trial in this case."

A chief of staff cannot, apparently, be held guilty of crimes of omission as a commanding general may be.(2) " A failure to properly exercise command authority," said the Judgment, " is not the responsibility of a chief of staff."(3) The Tribunal pointed out that " it was of course the duty of a chief of staff to keep [his] commander informed of the activities which took place within the field of his command in so far at least as they were considered of sufficient importance by such commander," but it appears from the context that the Tribunal regarded such duty as being one laid down by German military law and not one existing under International Law.(4) If it were laid down by International Law that a chief of staff must keep his commanding officer informed of certain matters then it would be possible for the chief of staff to be guilty of a war crime of omission, i.e., a failure to fulfil *his own duty* as a staff officer, not his superior's " command authority " referred to above. The Tribunal's words do not, however, allow it to be said that a chief of staff may be guilty of such a war crime of omission.

This conclusion is borne out by other words of the Tribunal indicating that only positive action can make a chief of staff guilty : " In the absence of participation in criminal orders or their execution within a command, a chief of staff does not become criminally responsible for criminal acts occurring therein."(5)

The opportunity of a chief of staff to commit war crimes seems, in the opinion of the Tribunal, to arise from his power " to issue orders and directives in the name of his commander," a power which varies widely in practice but which may allow sufficient exercise of initiative and discretion to involve the chief of staff in the commission of offences under the laws and usages of war.(6)

The attitude of the Tribunal can perhaps best be judged from its treatment of individual accused who were charged with having committed war crimes in their capacity as staff officers. The passages in the Judgment dealing with the accused Woehler are particularly interesting in this connection ; the following are relevant extracts therefrom :

" 1. The Commissar Order.

" The proof in this case shows the defendant, as Chief of Staff of the 11th Army, knew of the receipt of this order. It does not, however, establish

(1) On the other hand the Tribunal ruled that " If the basic idea is criminal under international law, the staff officer who puts that idea into the form of a military order, either himself or through subordinates under him, or takes personal action to see that it is properly distributed to those units where it becomes effective commits a criminal act under International Law "; whereas the preparation, and approval as to form, of criminal orders, and the distribution of such orders, appeared among the duties of either Foersch or von Geitner, who were nevertheless acquitted. It should be added, however, that the detailed legal drafting of these orders was in the hands of a legal department or officer outside the authority of the two accused named (see Vol. VIII, pp. 42-3).

(2) See above, pp. 105-12.

(3) See p. 81.

(4) See pp. 80-1.

(5) See p. 81.

(6) See pp. 81-2.

any participation in its transmittal to subordinate units. It also shows that he knew of the enforcement of this order in the 11th Army, but the responsibility for carrying out this order within the 11th Army must rest with the Commander-in-Chief and not with the Chief of Staff. Criminal acts or neglect of a Commander-in-Chief are not in themselves to be so charged against a Chief of Staff. He has no command authority over subordinate units nor is he a bearer of executive power. The Chief of Staff must be personally connected by evidence with such criminal offences of his Commander-in-Chief before he can be held criminally responsible. . . .

" 3. Murder and Ill-treatment of Prisoners of War.

" As Chief of Staff of the 11th Army, he is charged with responsibility for an order issued by the O/Qu for ' AOK.' While part of this order is considered criminal by the Tribunal, the fact that this order was issued by a subordinate of the defendant in the staff organization over whom he had no command authority leads the Tribunal to conclude that the defendant was not connected therewith. The O/Qu was a subordinate of the Chief of Staff, but he was also a subordinate of the Commander-in-Chief, and to hold the Chief of Staff responsible for this order, we must necessarily make the assumption that it was not issued by the Commander-in-Chief without his intervention, which the document in itself does not establish. The fact that this order was actually carried out by subordinate units as shown by evidence in the record is the responsibility, as stated above, of the Commander-in-Chief, and not of the Chief of Staff. . . .

" 5. The Barbarossa Jurisdiction Order.

" It is shown that this order was received by the 11th Army, but no criminal connection with its distribution has been established by the evidence as to this defendant. Criminal acts thereof are to be charged against the Commander-in-Chief not the Chief of Staff as heretofore stated. However, on 5th September, 1941, an order was issued by the 11th Army, signed for the AOK by Woehler, as Chief of Staff. From the nature of this order, it would appear that it was not of that basic nature which necessarily would be submitted to a Commander-in-Chief. It is such an order as a Chief of Staff would normally issue of his own volition. Whether or not that be so, the wording of this order would certainly be a matter that would come within the jurisdiction of a Chief of Staff of an army. This order provides in paragraph 5 as follows :

> ' Guarding the front lines alone is not sufficient. Corps as well as the Commander of the Army Rear Area has to send patrols constantly to the main rear lines of communication for " raids," which arrest all suspicious civilians and check whether they reside in the area. Civilians who are sufficiently suspect of espionage, sabotage, or of partisan activities, are to be shot by the GFP after interrogation. Strangers in the area who are unable to establish the purpose of their stay credibly are, if possible, to be turned over to the SD detachments, otherwise to prisoner camps to be sent on to the SD detachments. Young boys and girls, who are preferentially employed by the enemy, are not to be excepted.'

" Under this paragraph it is provided that civilians who are ' sufficiently suspected ' of certain offences are to be shot, including boys and girls. The defendant's explanation that this order does not mean what it says, is not convincing. At its best it could only be construed as ambiguous and if it meant something other than what it states, it was certainly the province of the Chief of Staff to see that that error was corrected. The Tribunal is of the opinion that it meant precisely what is stated and that the defendant was criminally connected therewith and is responsible therefor. . . .

" 8. Deportation and Enslavement of Civilians.

" The evidence in this case shows that as Chief of Staff of the 11th Army, orders pertaining to the use of civilians were issued for the 11th Army which were signed by Woehler. These orders are not basic orders and would normally be issued by a Chief of Staff without even consulting the Commander-in-Chief and certainly without such orders being drawn by the Commander-in-Chief. These orders show the illegal use of civilians with which the defendant is criminally connected. . . .

" 9. Murder, Ill-treatment, and Persecution of the Civilian Population.

" The evidence in this case establishes the elimination of so-called undesirables, mostly Jews, within the area of the 11th Army while Woehler was Chief of Staff . . . the Tribunal can only find that the defendant Woehler had knowledge of the extermination activities of the Einsatzgruppen when he was Chief of Staff of the 11th Army.

" He was not, however, the commanding officer, and his criminal responsibility must be determined from personal acts in which he participated or with which he is shown to have been connected. This resolves itself into the question as to whether as Chief of Staff he assigned Einsatzgruppen to various localities wherein they operated and carried on their illegal activities. That he did so is shown by both the testimony of Ohlendorf and by documents in evidence . . . These orders [i.e., certain orders reviewed by the Tribunal] as to the location of Einsatzgruppe units were not such basic orders as can be charged to the Commander-in-Chief, but would clearly be within the sphere of authority of a Chief of Staff.

" For reasons herein stated, and on the whole record, we find the defendant guilty under Counts Two and Three of the Indictment."

It seems then that a Chief of Staff may be held responsible for war crimes committed as a result of his orders if such orders are not " basic orders " such as " necessarily would be submitted to a Commander-in-Chief," but orders which " a Chief of Staff would normally issue of his own volition."

A remark made in the commentary to the *Hostages Trial*, appearing in Volume VIII, but based upon the findings of guilty passed upon two Japanese Chiefs of Staff in trials reported upon in Volume V,(1) may be repeated here: " Certainly the position of Chief of Staff provides no immunity upon its holder, and the responsibility of such a person for war crimes must be judged upon the facts of each case."(2)

(1) See Vol. V, pp. 62, 63, 67, 68 and 69.
(2) See Vol. VIII, p. 90.

The defence put up on behalf of the accused Lehmann was similar to the arguments maintained by accused staff officers in the *Hostages* and *High Command Trials* :

" Dr. Lehmann was not the highest judge of the Wehrmacht. He was not a judge in the proper sense. The administration of justice of the Wehrmacht—although this sounds very strange—was not subordinated to him, but to the particular branches of the Wehrmacht. Lehmann had no command authority towards the legal departments of the three branches of the Wehrmacht. He could not issue any order to the troops."

Counsel added :

" In these remarks a parallel emerges, the parallel to the Chief of Staff. . . .

" In this connection I may remind you that Military Tribunal V acquitted two defendants in Case 7 only for that reason that the nature of their position gave them no command authority. As to one of the defendants the Tribunal has stated :

> ' that he initiated or signed orders . . . which were unlawful when viewed in the light of the applicable International Law.'

" And that it belonged to his duties to work out and to sign such orders ; as to the other defendant the Tribunal has stated :

> ' that he exercised this power and influence upon his various Commanders-in-Chief in such a manner as to incriminate himself. . . .'

" The decisive point for the acquittal of both defendants had been that the defendants

> ' lacked the authority to issue such an order on their own initiative.'

" In conclusion, I quote from this Judgment and from the reasons concerning the defendant Foertsch. . . .

> ' The nature of the position of the defendant . . . his entire want of command authority, his attempts to procure the rescission of certain unlawful orders and the mitigation of others as well as the want of direct evidence placing responsibility on him, leads us to conclude that the Prosecution has failed to make a case against the defendant. No overt act from which a criminal intent could be inferred has been established.'

" These statements are of decisive importance for the evaluation of the responsibility and the competence of my client and their application would lead to the same result : The prosecution has failed to make a case against the defendant."

The Prosecution, however, in their *Brief of Argument* against the accused Lehmann, stated, *inter alia* :

" It is a generally recognized maxim that no man may plead ignorance of the law as an excuse. But when it can be shown that a trained lawyer deliberately prepared and issued orders which he knew at the time to violate not only every standard of fairness, equity and common decency, but various defined principles of International Law as well, the seriousness of his crime becomes magnified. There is an element of premeditation and deliberateness

in all of the acts for which Lehmann is being held responsible. It is impossible for a lawyer to sit down and draft a more or less complicated legal document without considering the question of its legality. . . .

"The orders and directives which form the subject matter of the prosecution's case against Lehmann were conceived, drafted and carried out in execution of criminal purposes and designs. In general, Lehmann played only a supervisory part or no part at all in the third step—the carrying out. It is not claimed that he personally gave orders to shoot Russian civilians on suspicion or that he physically transported Night and Fog defendants into Germany and isolated them from the outside world. But without the general orders which Lehmann had drafted and issued, not a single individual order could have been given . . . At the very least, Lehmann, by lending his technical advice and legal skill to these vicious schemes, became an accessory before the fact to murder. What he did fits perfectly into the classical definition :

> 'An accessory before the fact is one who, though absent at the commission of the felony, procures, controls or commands another to commit said felony subsequently perpetrated.'(1)

"That felonies were perpetrated as a result of the legislation moulded by Lehmann is beyond question."

The Tribunal, in dealing with the alleged responsibility of Lehmann, in effect adopted the prosecution's theory of Lehmann's liability while at the same time accepting the analogy of his position and that of a staff officer ; it decided, *inter alia*, that :

"The Barbarossa Jurisdiction Order which was finally produced is an excellent example of the fundamental and essential functions which a staff performs in producing a military order from an original idea. The record discloses conferences, telephone calls, and much correspondence, all independent of Hitler. In this way the details of the order were worked out. Many of these details originated in the minds of various staff officers and some in the mind of the defendant. . . .

"Under the record, we find him [Lehmann] responsible for criminal connection with, participating in, and formulation of this illegal order. . . .

"The Commando Order is another example of the part a staff officer plays in the final structure of a military order. Like the preceding Barbarossa Jurisdiction Order, it cannot be said that the whole of the Commando Order, or the major part of it, is a product of one man's mind. We are not concerned with the question of determining just how far the ideas of any one man are embodied in these orders, except in so far as ideas that can be traced to a given defendant show his own state of mind in contributing criminal parts to the criminal whole. The basic criminal offence is in the essential part a staff officer performs in making effective the criminal whole.

"We find no provisions in this order where he contributed to its inherent viciousness, but he was one of those responsible for its final production in

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(1) Wharton, on *Criminal Law*, 350.

the form in which this criminal order was transmitted to the army and he was criminally responsible for a part of the vicious product. . . .

" The Night and Fog Decree basically involved legal questions, and in this, as in the Barbarossa Jurisdiction Order, the defendant Lehmann was the major craftsman of its final form . . . we find him guilty as a participant of the final production of this terror programme."

The fact that the making of a substantial contribution to the drafting of an illegal order (as distinct from approving it from the point of view of form) may make an accused criminally liable was shown by the passages from the Judgment dealing with the defendant Warlimont, which stated, *inter alia,* that:

" There is nothing to indicate that those contributions which he made in any way softened its [the Commissar Order's] harshness, and we find the defendant guilty of a participating part in the formulation of this criminal order. . . .

" From this evidence it is apparent that not only did the defendant Warlimont contribute to the formulation of this order [the Commando Order], but that he participated in its enforcement. . . .

" We . . . find the defendant Warlimont connected with the illegal plan of the leaders of the Third Reich fostering the lynching of Allied fliers and that he contributed a significant part to this criminal programme. . . .(1)

" The Tribunal is of the opinion that these suggestions of the defendant Warlimont made at [certain] conferences are themselves sufficient to connect him criminally with the illegal programme of the Reich for recruiting slave labour. . . .

" We have found the defendant guilty of participating in many criminal orders which permeated the conduct of the war. He may not have furnished the basic ideas, but he contributed his part and was one of the most important figures of the group which formed them into the final product which, when distributed through the efficient agencies of the Wehrmacht and Police, brought suffering and death to countless honourable soldiers and unfortunate civilians.

" The defendant Warlimont is guilty under Counts II and III of the Indictment."

4. LIABILITY FOR UNEXECUTED ORDERS

In their Memorandum Brief on the alleged responsibility of von Kuechler under Counts II and III the Prosecution argued:

" A number of judicial findings of U.S. and British Tribunals concur in the opinion that the commander who knowingly and wilfully distributes an unlawful order becomes guilty of a criminal act *per se*, no matter whether this order was executed or not. It lies in the very nature of a military order that it is issued and passed down with the clear intent of being enforced by junior commands. By transmitting such an order to subordinate units, the

(1) Regarding the part played by Warlimont in the working out of the plan in question, see p. 45.

commander manifests his will that such an order be carried out. The International Military Tribunal went even further than this when it said, in considering Doenitz' connection with the ' Commando ' Order :

> ' But Donetz permitted the order to remain in full force when he became C.-in-C., and to that extent he is responsible.' (Trial of the Major War Criminals, Vol. I, p. 314.)

" In a war crimes trial held in February, 1947, before a British military court in Hamburg, the German Air Force General, August Schmidt, was charged with ' committing a war crime in that he, at Muenster, Germany, in 1944, in violation of the laws and usages of war, was concerned in the issuing of an order whereby members of Allied Air Forces, when prisoners of war, were to be denied protection by their German escorts if attacked by the populace.' The contention of the Prosecution in this case was that General Schmidt had distributed to subordinate commands an unlawful order which he had received from the OKW. It was not even alleged that this order was carried out by military personnel under the defendant's jurisdiction. The Tribunal found that Schmidt was guilty of the charge, and imposed a sentence of life imprisonment on him, which was commuted by the reviewing authority to ten years' imprisonment. (Ex. 1463, NOKW-3061, Bk. 6 Sup., p. 50.)

" Tribunal No. V, in discussing the responsibility of the defendant Rendulic for passing on the Commissar Order, declared in its opinion :

> ' The order was clearly unlawful, and so recognized by the defendant. He contends, however, that no captured Commissars were shot by troops under his command. This is, of course, a mitigating circumstance, but it does not free him of the crime of knowingly and intentionally passing on a criminal order.' (*Case No.* 7 *Tr.* 10510.) "

In their closing speech, the Prosecution claimed further that: " The defendant Raeder was convicted by the International Military Tribunal of having committed war crimes largely because he passed the Commando Order ' down through the chain of command.' Military Tribunal V, in the *Hostage Case,* convicted Rendulic of passing down the Commissar Order, although there was no proof in the record in that case that any Commissars were shot by the troops of Rendulic's division."

Counsel for von Kuechler does not appear to have dealt with this question in his closing speech. Counsel for von Salmuth, however, argued as follows :

" The Prosecution claims in its Final Plea that in Case VII the defendant Rendulic was convicted, although there was no evidence that any Commissar had been shot by the unit. This opinion has no legal basis in Article II, para. 1 (b) and (c) of the Control Council Law, and is not tenable in view of the clear formulation of the law. For the crimes punished by the law are acts of violence against person or life. An order to murder or to ill-treat somebody must consequently always have resulted in the actual perpetration of such acts of violence."

Counsel claimed further that: " The case of the defendant von Salmuth is, however, quite different from that of the defendant Rendulic," and cited the following passage from the Judgment in the *Hostage Trial*: " He admits

that the legality and correctness of this order was discussed, and that it was generally considered illegal. He testified that he considered the order as a reprisal measure, the purpose of which was unknown to him. But a mere assertion of this nature, unaccompanied by evidence which might justify such an assumption, is not a defence. Such an assertion could be made as an excuse for the issuance of any unlawful order or the committing of any war crime, if it were available as a defence *ipso facto*. We do not question that circumstances might arise in such a case that would require a court to find that no criminal intent existed, but it must be based upon something more than a bare assertion of the defendant, unsupported by facts and circumstances upon which a reasonable person might act."

Counsel continued : " Such facts and circumstances were not only stated by the defendant von Salmuth himself, they are proved also by the evidence that has been submitted."

The Tribunal found that the accused von Kuechler had not in fact passed down the illegal Commando Order :

" This order was transmitted by the OKH directly to the armies as well as to the Army Group North, of which the defendant was then in command. The evidence in this case does not show it was put by the defendant into the channels of command for subordinate units. The order was not particularly applicable in the eastern area, and there is no evidence to show that it was carried out within his command. Under these circumstances we fail to find the evidence sustains a criminal act by the defendant in connection with this order."

Of von Salmuth the Tribunal ruled as follows :

" The Commissar Order was received by the defendant while he was Commanding General of the XXX Army Corps. The evidence shows that it was distributed to subordinate units by him. He states that he rejected the order and acquainted his divisional commanders with his objections. The evidence does not establish that the order was ever carried out within the XXX Army Corps while it was under the command of the defendant. Two instances are cited which, it is urged, show it was carried out ; in one instance within the 17th Army over which he subsequently became the Commander-in-Chief. This instance occurred approximately one month before his arrival. The second instance relied on occurred in the 4th Army approximately one month after he assumed command. This instance is considered ambiguous as to whether or not the Commissars were in fact executed after they had been taken prisoner. In neither instance, however, is it considered that the defendant can be charged because from the time element, it cannot be said that they occurred with his acquiescence or approval or due to any order which he had distributed."

In finding the accused von Salmuth guilty under Counts II and III, the Tribunal did not, however, indicate whether it regarded the fact that he passed down the illegal order as contributing towards his guilt, but it would not be wise to assume that the Tribunal recognized the non-performance

of an order as always clearing of criminality the person who gave the order.(1)

The Judgment stated that the Tribunal considered field commanders "criminally responsible for the *transmission* of an order that could, and from its terms would, be illegally applied where they have transmitted such an order without proper safeguards as to its application." The Tribunal then added, however, that "for that failure on their part they must accept criminal responsibility for its *misapplication* within subordinate units to which they transmitted it."(2)

Dealing with the question of orders *transmitted* by commanders, the Tribunal said that "to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal."(3)

Dealing with certain orders requiring the execution of partisans, the Tribunal said that: "The orders to execute such persons and mere suspects on suspicion only and without proof, were criminal on their face. Executions pursuant thereto were criminal. Those who gave or passed down such orders must bear criminal responsibility for passing them down *and* for their implementation by the units subordinate to them."(4) Again, the Tribunal ruled elsewhere that: "Reinhardt held the executive power for his area, and it was his duty to exercise it for the protection of the population. He was obligated not to deport them, not to despoil them of their property, nor to send both those innocent and those guilty of aiding the so-called bands to concentration camps, as well as sending the 1925 and 1926 groups to forced labour in the Reich. The orders to do those things were criminal orders, and they were fully implemented by him. He is criminally responsible for issuing the orders *and* for the acts done in implementation of them."(5) The giving of illegal orders was here treated as an individual offence.

Even more clearly indicating the Tribunal's attitude were its words regarding the accused Reinhardt's responsibility regarding the Commando Order; after making certain remarks concerning that order, the Tribunal stated: "It was a criminal order, Reinhardt passed it down in the chain of command,"(6) *and then went on immediately to speak of mitigating circumstances*, thus showing that they regarded a crime as having been described: "It may be stated as a matter somewhat in mitigation and as showing the personal attitude of the defendant Reinhardt, that in November, 1943, he issued an order that parachutists are lawful combatants and are to be treated as prisoners of war. That was at a time when the German Army was not

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(1) As stated on p. 82, the Tribunal found certain orders to be criminal but this fact does not necessarily signify that the mere passing down of such orders would be a war crime, since it could also mean (i) that the *carrying out* of such orders would be criminal; or (ii) that the order could not be relied upon as giving grounds for a plea of superior orders by a defendant who had acted on it, if its illegality was known to him or would have been obvious to a reasonable man.

(2) See pp. 83-4. (Italics inserted.)

(3) See p. 74.

(4) See p. 86. (Italics inserted.)

(5) Italics inserted.

(6) The Tribunal had already referred to the Commando Order as "criminal *on its face*."

so flushed with success and when it was a little more inclined to soften the treatment meted out to the Russians. The Tribunal has noted it as being a matter proper, at least for consideration, on the question of mitigation. It should further be noted in this connection that it does not appear that Reinhardt, though he received it, ever passed on literally or in substance the notorious Reichenau Order."

As the Prosecution in the *High Command Trial* pointed out, the Judgment delivered in the *Hostages Trial* had recognized that the fact that the accused Rendulic's illegal passing down of the Commissar Order was not followed up by his troops, while it may constitute a mitigating circumstance, did not free him from criminality.(1) The arguments of the Prosecution based upon the conviction of Doenitz and August Schmidt also appear to be sound. Two British war crime trials reported in these volumes also illustrate the fact that there may be liability for unexecuted orders. In the trial of von Falkenhorst by a British Military Court in Brunswick, the ninth charge claimed that the accused " ordered troops under his command to deprive certain Allied prisoners of war of their rights as prisoners of war, under the Geneva Convention." It was shown that the order was never carried out, yet the accused was found guilty under this charge, amongst others.(2) In the trial of Karl Heinz Moehle by a British Military Court, the charge against the accused was one of giving orders to commanding officers of U-boats, who were due to leave on war patrols, " that they were to destroy ships and their crews." There was no clear evidence that the orders were carried out by persons subordinate to the accused yet he was found guilty under the charge.(3)

The Tribunal acting in the *Hostages Trial* pointed out that the Commissar Order " was *clearly unlawful and so recognized by the defendant* " [Rendulic] and decided that its non-performance " does not free him of the crime of *knowingly and intentionally* passing on a criminal order."(4) An examination of the facts in the two British trials indicates that here the accused intentionally passed down orders which they must have recognized to be criminal (i.e., which, to use the words of the Judgment in the *High Command Trial*, were criminal on their face).(5)

It appears therefore from the various authorities quoted above that an accused can be found guilty on the grounds of making or transmitting an unexecuted illegal order if he knew that it was illegal or if it was " criminal upon its face."

In view of the fact that the *mens rea* of an accused is unaffected by the non-performance of his orders (provided that he thought that they could be performed), there is no argument of justice which could be brought against such convictions as those described above, and the acts of the accused can be classified under the law either of attempts or of incitements. The illegality of the mere giving of an unlawful order would appear to have been recognized even under conventional International Law, since Article 23 (d)

(1) See Vol. VIII, p. 90.
(2) See Vol. XI, pp. 20 and 23.
(3) See Vol. IX, pp. 75 and 80-1.
(4) See Vol. VIII, p. 90.
(5) See p. 121.

of the Hague Convention lays down that: " It is particularly forbidden . . . to declare that no quarter will be given." It will be recalled that Brigadefuehrer Kurt Meyer was found guilty on charges including one which said that he " in violation of the laws and usages of war, incited and counselled troops under his command to deny quarter to Allied troops."(1)

5. THE PLEA OF MILITARY NECESSITY

In their " Memorandum of Law and Facts " dealing with the alleged responsibility of von Kuechler under Counts II and III, the Prosecution stated, *inter alia*:

" Military necessity was pleaded by most of the defendants as an alleged defence for the execution of the scorched earth policy during retreat. They also sought to justify the wholesale deportation of the civilian population as a measure of military necessity, their theory being that by this means the advancing enemy was thus prevented from using its manpower for his own purposes. This theory is nothing more than the reapplication of the well-known German principle " Kriegsraison geht vor Kriegsmanier " (necessity in war goes before chivalry in warfare) which has been advanced by various German writers and faithfully transmitted into action by the German Armies during the last two World Wars. According to this theory, the laws of war lose their binding force in case of extreme necessity, which was said to arise when the violation of the laws of war offers other means of escape from extreme danger, or the realization of the purpose of war—namely, the overpowering of the enemy. Such a theory is merely a denial of all laws, and a reaffirmation of the philosophy that the end justifies the means. English, American and French writers do not acknowledge it (see, e.g., Borsi " Ragione di guerra e state di necessita in diritto internazionale 1918," pp. 97-102, Strisower " Der Krieg und die Voelkerrechtsordnung," pp. 85-108, 1919, de Vischer " Les lois de la guerre et la theorie de la necessité," 1917). The protest against the German conception of necessity rests, generally speaking, in the great danger involved in its admission. Thus, the German scholar, Strupp, states with respect to that maxim:

> ' If this opinion were justified, no law of warfare could exist. For every rule might be declared impracticable on the ground that it is contrary to military necessities. This opinion is absolutely contrary to the historical development of the rules of warfare.' (*Woerterbuch des Voelkerrechtes und der Diplomatie, Berlin und Leipzig*, 1923.)

" Oppenheim arrives at a similar conclusion:

> ' The proverb dates very far back in the history of warfare. It originated and found recognition in those times when warfare was not regulated by laws of war, i.e., generally binding customs and international treaties, but only by usages (Manier, i.e., Brauch), and it says that necessity in war overrules usages of warfare. In our days, however, warfare is no longer regulated by usages only, but to a greater extent by laws—firm rules recognized either by international treaties or by general custom. These conventional and customary rules cannot be overruled by necessity, unless they are framed in such a way as not to apply to a case of necessity in self-preservation. Thus, for instance,

(1) See Vol. IV, pp. 98 and 108.

the rules that poisoned arms and poison are forbidden, and that it is not allowed treacherously to kill or wound individuals belonging to the hostile army, do not lose their binding force even if their breach would effect an escape from extreme danger or the realization of the purpose of war. Article 22 of the Hague Regulations stipulates distinctly that the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in a case of necessity. What may be ignored in case of military necessity are not the laws of war, but only the usages of war.' (International Law, Vol. II, 6th Edition, pp. 183-185.)

" The provisions of International Law which prohibit the deportation, enslavement and starvation of civilians are unconditional.(1) Military necessity is no defence to a charge of violation of these. There is no defence.

" It is true that the prohibitions of the Hague Rules with respect to seizures and destructions are not quite so categorical and rigid. The applicable Article forbids :

' To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.' (*Article* 23 *g*.)

" Therefore, it is by no means a valid excuse that a criminal act, labelled as military necessity, was of utility and convenience to the Party and might indirectly influence the end of the war. The meaning of ' imperatively demanded ' has been judicially defined as follows :

' " Imperative " is a necessity only in case of an instant and overwhelming necessity for self defence, leaving no choice of means and moment of deliberation.' (*The Caroline*, Moore's Digest of International Law, Vol. II, p. 412.)(2)

" Two comments should be made about the validity of the defence of military necessity to the charge of wanton destruction and pillage.

" In the first place, it is our position that the defence of military necessity can never be utilized to justify destruction in occupied territory by the perpetrator of an aggressive war. To allow such a defence to be interposed in such circumstances would result in a farcical paradox. It is perfectly apparent that the phrase ' imperatively demanded by the necessities of war ' was never intended to justify the commission of one criminal act in order to extricate the perpetrator from the consequences of another criminal act. The International Military Tribunal has already held that the German war against the USSR was an act of aggression. It also held that participation in the planning and preparation for such a war was a crime. *This is res adjudicata.*

" As is shown in the Prosecution's supporting brief on Count I, Kuechler, along with all the other defendants, was up to his neck in these plans and preparations. The whole time he was in Russia, he was, therefore,

(1) " Sections 49-52, Hague Rules of Land Warfare."
(2) The " Caroline Incident " has been cited and described in Vol. I of these Reports, pp. 4 and 16-17.

acting in furtherance of a criminal design. The only military necessity he can point to was caused by his being where it was a crime for him to be in the first place. . . .

" We submit that it is inconsistent on the one hand to hold a defendant guilty of planning and preparing for an aggressive war, and on the other hand to hold that the wanton destruction and pillage carried out by his troops upon orders in the course of such a war is excusable on the ground of military necessity.

" The second remark which should be made about this defence of military necessity relates to the burden and nature of proof. It is our contention that it is an affirmative defence, similar to the plea of self-defence in a murder trial or of contributory negligence in an action for damages for personal injuries. A bare declaration by the defendant that what was done was militarily necessary has no more probative substance than a statement contained in an answer or other pleading. In order to make out a valid defence of destruction or pillage on the ground of military necessity, the defendant must prove by positive evidence that the facts and circumstances were such at the time he ordered these measures that he would be justified in believing them to be necessary to save his troops from an imminent major disaster. In the course of his testimony, Kuechler made a few casual remarks that certain ' tactical measures ' (Tr. 2901) had to be taken during evacuations. His vague testimony is unsupported by any other evidence. It is true that every house, church, school and hospital destroyed by a retreating army can conceivably annoy and inconvenience the army which advances over the devastated area later ; the same is true of pillage. But this is a question of *military expediency*, not of military necessity."

The second remark of the Prosecution would command universal respect, but the Tribunal would appear to have rejected the argument that the accused could never plead military necessity in the course of a criminal war ;(1) it conceded that the plea of military necessity did, in the circumstances proved, serve to exculpate the accused on certain charges concerning spoliation. It was emphasized that the defendants were "in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature."(2)

Thus, in dealing with Reinhardt's alleged responsibility for plunder and spoliation, the Tribunal said :

> " The evidence on the matter of plunder and spoliation shows great ruthlessness, but we are not satisfied that it shows beyond a reasonable doubt, acts that were not justified by military necessity."

(1) Compare the ruling of the Tribunal which conducted the *Hostages Trial* that the rights and duties of an occupying power are not altered by his having become such an occupant as the result of aggressive warfare ; see Vol. VIII, pp. 59-60.
(2) See pp. 93-4.

Similarly, of Hollidt's guilt under a charge of plunder of public and private property, it was said that:

> " In connection with this charge we consider it established by the evidence and particularly by Exhibit 573 that the defendant considered civilian authorities subordinated to the army in matters concerning evacuation, and he directed that ' everything which could be usable to the enemy in the area must be destroyed if no evacuation is possible.' The Tribunal does not feel that the proof establishes that the measures applied were not warranted by military necessity under the conditions of war in the areas under the command of the defendant. Nor does the proof establish what property was removed to the rear with his knowledge and consent.
>
> " We are therefore unable to find the defendant criminally responsible under this heading."

The Tribunal which conducted the *Hostages Trial* was also called upon to decide on the validity of pleas based on alleged military necessity put forward by the defendants in that trial.(1) It decided that " Military necessity or expediency do not justify a violation of positive rules . . . The rules of International Law must be followed even if it results in the loss of a battle or even a war." The Tribunal added, however, that the prohibitions contained in the Hague Regulations " are superior to military necessities of the most urgent nature *except where the Regulations themselves specifically provide the contrary*,"(2) and pointed out that Article 23 (g) of those Regulations prohibited " the destruction or seizure of enemy property *except in cases where this destruction or seizure is urgently required by the necessities of war*."(3)

Like the Tribunal which conducted the *High Command Trial*, that before which the *Hostages Trial* was held was of the opinion that the plea of necessity might be applicable in the circumstances of an army badly harassed while in retreat: " The destruction of public and private property by retreating military forces which would give aid and comfort to the enemy may constitute a situation coming within the exemptions contained in Article 23 (g)." The Tribunal thus adopted a favourable attitude to the plea as it related to the acts of the accused Rendulic in his retreat before the Russian Army in Finmark, Norway.(4)

The Judgment delivered in the *Hostages Trial* stated in effect that the plea of mistake of fact could, in suitable cases, be successfully pleaded in conjunction with the plea of military necessity ; the Tribunal pointed out that the offensive feared by Rendulic did not materialise, but added : " We are obliged to judge the situation as it appeared to the defendant at the time. . . . We are concerned with the question whether the defendant at the time of its occurrence [i.e., the devastation in Finmark] acted within the limits of honest judgment on the basis of the conditions prevailing at the time."

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(1) See Vol. VIII, pp. 66-9.
(2) Italics inserted.
(3) Italics inserted.
(4) See Vol. VIII, pp. 67-9.

The plea of military necessity has been more often rejected in war crime trials than accepted however ; indeed, the success of Rendulic and the accused in the *High Command Trial* in this respect was exceptional.

The plea was rejected for instance in the trial of Heinz Eck and Others by a British Military Court at Hamburg.(1) Here, the defence claimed that the elimination of all traces of the sunken ship *Peleus* was operationally necessary in order to secure the safety of the U-boat which sank her.(2)

The Judge Advocate acting in that trial advised the Court that the question whether or not any belligerent is entitled to kill an unarmed person for the purpose of saving his own life did not arise in the present case. It may be, he said, that circumstances could arise in which such a killing might be justified. On the facts which had emerged in the present case, however, the Judge Advocate asked the Court whether or not it thought that the shooting with a machine gun at substantial pieces of wreckage and rafts would be an effective way of destroying every trace of the sinking. A submarine commander who was really and primarily concerned with saving his crew and his boat would have removed himself and his boat at the highest possible speed at the earliest possible moment for the greatest possible distance. All accused were found guilty.

The plea was also rejected in the trial of Gunther Thiele and Georg Steinert by a United States Military Commission at Augsberg. The accused were found guilty of killing a prisoner of war while they were in hiding from Allied troops by whom they were closely surrounded.(3) Attempts on the part of the defence in the *Milch* and *Krupp Trials* to plead in effect that military necessity must under conditions of modern warfare be taken to include economic necessity did not meet with any success. In the former trial Judge Musmanno pointed out that with all its horror modern war was still " not a condition of anarchy and lawlessness," while the Judgment delivered in the latter trial stated firmly that : " It is an essence of war that one or the other side must lose and the experienced Generals and Statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war."(4)

6. CRIMES AGAINST PEACE

The defendants in this trial were all acquitted on the Count alleging crimes against peace,(5) on the grounds that while they may have had knowledge that an aggressive war was intended or was being waged, they were not on the " policy-making level " and therefore were not " in a position to shape or influence the policy that brings about its initiation or its continuance after initiation. . . ."(6)

The question of crimes against peace will be the subject of a general comment in Volume XV of this series.

(1) See Vol. I, pp. 4, 11-12 and 15-16.
(2) It will be recalled that the prisoners were accused of having violated the laws and usages of war not by sinking the merchantman, but by firing and throwing grenades on the survivors of the sunken ship.
(3) See Vol. III, pp. 56 and 58.
(4) See Vol. VII, pp. 44 and 65, and Vol. X, pp. 138-9 and 160.
(5) See pp. 65-70.
(6) See p. 68.

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continued from p. 2 of cover

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